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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 76-50

CINCINNATI GAS & ELECTRIC COMPANY,
Owner of M/V "Reddy Kilowatt",
Petitioner,

v.

PATRICIA ABEL,
dba NEW RICHMOND BOATING CENTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PATRICIA ABEL,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered on April 16, 1976.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio, granting the Respondent's motion for summary judgment and ordering the dismissal of the Petitioner's complaint, which opinion was docketed on July 8, 1975, is printed in Appendix K hereto. The order of the District Court, entered on the same day, is printed in

Appendix L hereto. The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the District Court, filed on April 16, 1976, is printed in Appendix M hereto, and the judgment of the same Court, entered on the same day, is printed in Appendix N hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 16, 1976. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, providing for review of decisions of the United States Court of Appeals by this Court.

The basis for federal jurisdiction in the court of first instance was Title 46, United States Code, Section 183.

QUESTION PRESENTED FOR REVIEW

Where, in a maritime tort action properly pending in a state court, the plaintiff challenges the right of a vessel owner under 46 U.S.C. § 183 (a) to limit his liability by raising such a defense in his answer, and where the state court disclaims jurisdiction on such question, is the vessel owner then precluded from invoking the jurisdiction of the United States District Court, for a determination of such limited question, by reason of the six-month limitation provided for in 46 U.S.C. § 185?

STATUTORY PROVISIONS

46 U.S.C. § 183:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel,

> or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 185:

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, *may* petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. (Emphasis supplied)

28 U.S.C. § 1333:

> The district courts shall have original jurisdiction, exclusive of the courts of the States of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

On July 7, 1972, the New Richmond Ferry broke loose from her moorings and began drifting downstream in the Ohio River until it collided with the New Richmond Marina owned by Respondent, Patricia Abel. The M/V "Reddy Kilowatt", owned by the Petitioner, Cincinnati Gas & Electric Company, was summoned to the scene by the police and, in the course of her Good Samaritan efforts, came in contact with the marina.

On May 7, 1974, Patricia Abel commenced Case No. A-743423 in the Court of Common Pleas of Hamilton County, Ohio, against Cincinnati Gas & Electric Company and New Richmond Ferry, Inc. (Appendix A). On June 19, 1974, the defendant, Cincinnati Gas & Electric Company, filed an answer in that case (Appendix B) which, in its Seventh Defense, set up a vessel owner's right to limit his liability to the value of the hull and cargo under 46 U.S.C. § 181, et seq. Paragraph 13 of that answer specifically averred that the only claim or claims being made against the "Reddy Kilowatt" were those made by Patricia Abel in the case in which the limitation of liability defense was being set up. In other words, this was *not* a multiple claim situation, in which two or more injured or damaged persons might have to share a single recovery fund.

Thereafter, Cincinnati Gas & Electric Company filed a motion for partial summary judgment in the Hamilton County Common Pleas Court on the limitation of liability issue (Appendix C), supporting it with the affidavit of an appraiser with respect to the value of the vessel. Patricia Abel opposed the motion for partial summary judgment on a number of grounds, contending that CG&E did not have the right to limit its liability (Appendix D). When this resistance appeared, the vessel owner, on the strength of two decisions of this Court, requested a stay of proceedings in the state court so that the jurisdiction of the United States District Court could be invoked, at least temporarily, for a determination of the purely maritime question with respect to limitation of liability, a question as to which only a true admiralty court could exercise jurisdiction (Appendix E). Patricia Abel opposed both the motion for partial summary judgment and the motion for a stay with several memoranda, adding to previous assertions the contention that the six months' limitation in 46 U.S.C. § 185 was applicable (Appendix F). The state court overruled the vessel owner's motion for partial summary judgment, but granted a stay so that a proceeding could be filed in the United States District Court for the Southern District of Ohio (Appendix G).

Within the time provided in the state court's order, Cincinnati Gas & Electric filed its complaint in the United States District Court for the Southern District of Ohio, in which the allegations of its pleadings in the Common Pleas Court were re-averred and copies of all of the pertinent pleadings from that court were attached (Appendix H). The principal relief sought was a determination of the limitation of liability question which the state court felt powerless to decide, although it was recognized that the District Court might choose to retain jurisdiction on all questions once it had become deeply involved in most of the issues in the case.

Patricia Abel filed her claim and answer in the District Court, praying for the same relief as she did in her complaint in the state court and on the same basis (Appendix I). She also set up several affirmative defenses including (in the Fifth Defense) the six months' provision of 46 U.S.C. § 185. Patricia Abel then filed a motion to dismiss and/or for summary judgment based on the six month limitations' claim (Appendix J). The transmission of a

letter from counsel for Patricia Abel to Cincinnati Gas & Electric Company on January 30, 1974, was not, and is not, contested. The answer in Common Pleas Court was filed within six months of that date, but Mrs. Abel, at one point in the state court referred to a notice to the vessel owner's insurer dated March 4, 1973 (which would make the filing of the answer more than six months after notice). Although only the January 30, 1974, date was asserted in the District Court, we think it matters not which notice date applies.

After the single question raised by Mrs. Abel's motion was extensively briefed, Judge David S. Porter rendered his opinion and order of July 8, 1975, which prohibited the vessel owner from raising a limitation of liability defense because of the six months' provision and which then dismissed the complaint of Cincinnati Gas & Electric Company (Appendices K and L). The Petitioner then perfected an appeal to the United States Court of Appeals for the Sixth Circuit which acknowledged that "the question presented here is a close one." However, the Sixth Circuit affirmed the decision of the District Court (Appendices M and N). This appeal followed.

REASONS FOR ALLOWANCE OF WRIT

The decision of the Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court, has brought about the following results, all of which are reasons for granting the Petitioner's prayer that a writ of certiorari issue:

1. It has created a situation in which a substantive right is effectively denied to one class of litigants (defendants in admiralty cases brought in the state courts under the "saving to suitors" clause) while another class of litigants (defendants in admiralty cases

brought in the United States District Courts) continue to have that substantive right.

2. It has created what appears to be a conflict among the circuits by holding, in effect, that 46 U.S.C. § 185 applies to a much broader spectrum of situations than other circuits have held.

3. It has engrafted new and discriminatory limitations on previous holdings of this Court.

4. It has disregarded the previously recognized distinction between 46 U.S.C. § 183 and 46 U.S.C. § 185, contrary to the acknowledged legislative intent.

ARGUMENT

The Cincinnati Gas & Electric Company, the vessel owner in the present case, in its answer and later in its motion for partial summary judgment filed in the Hamilton County Common Please Court, attempted to take advantage of 46 U.S.C. § 183 (a) which is set forth on pages 2-3 of this brief.

The exception in subsection (b) of the statute is not applicable to the present case, and 46 U.S.C. § 188 makes the Section 183 applicable to "all vessels used on lakes or rivers or in inland navigation."

Mrs. Abel has contended (successfully in the District Court and in the Court of Appeals) that any vessel owner raising Section 183 (a) must also be subject to 46 U.S.C. § 185 which is set forth on page 3 of this brief.

It is our contention that Section 185 is applicable only when the limitation of liability defense is initially raised by the vessel owner in an original petition filed by such owner, for example, in the situation where there are mul-

tiple claimants and the limitation of liability proceeding is in the nature of an interpleader action. It is our further contention that Section 185 has no applicability where, as in the present case, the limitation of liability right is initially raised by the vessel owner, by answer, as an affirmative defense in a damages action arising from a single claim incident.

It is seldom that a litigant's position on appeal can be set forth in a series of propositions leading to a conclusion in the format of a syllogism. This is one of those rare instances. The series of propositions which we advance may be listed in this fashion:

A. A litigant seeking to assert a bodily injury or property damage claim arising out of a maritime casualty has the right, under the "saving to suitors clause," 28 U.S.C. § 1333, to elect to file his action in an appropriate state court.

B. When an action is brought in a state court under the savings to suitors clause, substantive admiralty law applies.

C. A vessel owner-defendant in such a case is entitled to set up the limitation of liability defense created by 46 U.S.C. § 183 (a).

D. In a single claim admiralty action in the United States District Court, a vessel owner-defendant may raise the limitation of liability defense, by answer, even though more than six months have elapsed since receipt by it of written notice of the plaintiff's claim.

E. Therefore, a vessel owner-defendant, sued in a single claim action in a state court, may raise the limitation of liability defense, by answer, even though more than six months have elapsed since receipt by it of a written notice of the plaintiff's claim, and notwithstanding the provisions of 46

U.S.C. § 185. If, in such a situation, the plaintiff challenges such defendant's right to do so and the state court disclaims jurisdiction on such issue, the vessel owner is entitled to invoke the jurisdiction of the appropriate United States District Court for a determination of its right to assert such defense.

If the foregoing analysis is correct, we are obviously entitled to a reversal of the District Court and the Court of Appeals. We will now elaborate on these five steps in the same order in which they appear above.

A. The Saving to Suitors Clause

By virtue of 28 U.S.C. § 1333, the United States District Court is given original jurisdiction in admiralty and maritime matters "saving to suitors in all cases all other remedies to which they are otherwise entitled." Thus, as is pointed out in Gilmore & Black, The Law of Admiralty, Second Edition (1975), at page 40:

> "Where the suit is *in personam,* it may be brought *either* in federal court under the admiralty jurisdiction (which must in that case either be specifically invoked by the plaintiff or visibly be the only ground of federal jurisdiction) *or* under the saving clause, in an appropriate non-maritime court, by ordinary civil action. Where the suit is *in rem,* only the federal court, acting under its admiralty power, has jurisdiction."

Clearly, therefore, Mrs. Abel (and any other future litigant) had every right to file her *in personam* action in the Court of Common Pleas of Hamilton County, Ohio. Furthermore, an action brought in the state court under the "saving to suitors" clause cannot be removed to the United States District Court merely because it is a case which could have been brought in admiralty. On the contrary, in order

to remove such a case, the defendant must establish all of the usual prerequisites for removal, including diversity of citizenship, something which did not exist in the present case, a controversy between an Ohio citizen and an Ohio corporation.

The necessity of demonstrating all of the usual removal requirements was recognized by this Court in *Romero* v. *International Terminals Operating Co.,* 358 U.S. 354 (1959), at 359-380, reh. den. 359 U.S. 926. When the precise question has come up after an attempted removal of a case without the diversity or dollar amount requirements, district courts have, without exception, remanded the case back to the state court. Such decisions include *Ross* v. *Pacific S.S. Co.,* 272 Fed. 538 (D. Ore. 1921); *Hill* v. *United Fruit Co.,* 149 F.Supp. 470 (S.D. Cal. 1957); *Erickson* v. *Moore Mill & Lumber Co.,* 157 F.Supp. 888 (D. Ore. 1958); *Victorias Mill Co.* v. *Hugo Neu Corp.,* 196 F.Supp. 64 (S.D. N.Y. 1961); and *Commonwealth of Puerto Rico* v. *Sea-Land Service, Inc.,* 349 F.Supp. 964 (D. P.R. 1970).

B. The Applicability of Substantive Admiralty Law under the Saving to Suitors Clause

In Gilmore & Black, at pages 50 and 51, the following statement appears:

> "What law is to be applied to cases of a maritime nature brought in state court under the saving clause? The general answer might seem clear: The same substantive law ought to be applied as would have been applied had the suit been brought in admiralty. Specifically, the general maritime law, where applicable, ought to rule, even though the suit is brought in state court. It seems generally undesirable that the choice of forum should at the same time be a choice of applicable substantive law."

The authors then express some concern over this conclusion on the basis of a 1947 opinion of Mr. Justice Frankfurter of this Court but ultimately conclude that their judgment is correct on the strength of the decision in *Kossick* v. *United Fruit Co.,* 365 U.S. 731 (1961), reh. den. 336 U.S. 941 (1961), in which, in a diversity action, the general maritime law was held to govern the validity (as against a State statute-of-frauds objection) or an agreement between a seaman and his employer with respect to liability for defective medical treatment.

In concluding that their analysis is correct, Gilmore & Black also point to Mr. Justice Frankfurter's apparent repudiation of his 1947 position in his concurring opinion in another civil side diversity case, *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953). In that case it was held that contributory negligence was not a complete bar to recovery (as it would have been under applicable state law), where the plaintiff's claim was predicated upon unseaworthiness. At page 416, Mr. Justice Frankfurter says that "unseaworthiness is a federally created right, so state law on a state cause of action is not an issue." At pages 410 and 411 in his opinion in the same case, Mr. Justice Black makes it quite clear that the principle of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), is entirely consistent with the requirement that, in a case arising on navigable waters, the same law applies irrespective of which court or which "side" of a court happens to be hearing the case, saying:

> "Of course the substantial rights of an injured person are not to be determined differently whether his case is labeled 'law side' or 'admiralty side' on a district court's docket."

It would appear that this statement is equally applicable to a defendant as it is to a plaintiff and, further, that it is

equally applicable to a state-federal court choice of forum as it is to law side-admiralty side choice.

Other decisions of this Court are entirely consistent with our contention, including one which arose in a state court, *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239 (1942). There the defendant in a Jones Act case raised a defense based upon a release executed by the plaintiff. The plaintiff claimed the release was obtained by fraud. duress and misrepresentation. Under state law, the plaintiff had the onus of proving the fraud by "clear, precise and indisputable evidence." Under admiralty law, the responsibility was on the defendant, by a heavy burden of proof, to show that no advantage had been taken of the seaman and that the release was fully understood by him at the time of its execution. The decision of this Court, again handed down through Mr. Justice Black, was that the state court must apply all of the substantive rights that the seaman was entitled to under the general admiralty law. The contrary state decision was reversed because of the Pennsylvania court's failure to apply the admiralty rules with respect to the release. At page 42 of his opinion, Mr. Justice Black makes this statement:

> "There is no dearth of example of the obligation of law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice."

One of the more recent decisions in this area by this Court is *Kremarec* v. *Campagnie Generale Transatlantique,* 358 U.S. 625 (1959). That case was a civil action, not an admiralty action, and was brought in the United States District Court which applied New York law by classifying the plaintiff as a gratuitous licensee. The Court's holding, however, was that, since the injury occurred on navigable

waters and since the admiralty jurisdiction did not make any distinction between classes of persons, the lower courts had to be reversed. That decision was predicated upon the conclusion that an action for damages arising in navigable waters must be measured and controlled by the standards of the admiralty law. In reaching this conclusion, Mr. Justice Stewart (at page 628) made the following comment most appropriate in the present context:

> "If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties."

Finally, we cite the recent decision in *Moragne* v. *States Marine Lines,* 398 U.S. 375 (1970), in which it is held that the general federal maritime law permits a claim for wrongful death in a state court action based upon the ground of unseaworthiness, even where no such claim is cognizable under the state wrongful death practice. This decision seems to reinforce the conclusion that, once a cause of action arises in navigable waters, *all* substantive rights of the parties are to be governed by the applicable maritime law irrespective of which court happens to be the forum in which the case is to be tried.

C. The Limitation of Liability Defense is Available in a State Court Proceeding

One of the somewhat early, but frequently cited cases on this point is *The Lotta,* 150 Fed. 219 (D. S.C. 1907). The significant language in that case appears on page 221 and 222 of the opinion and reads as follows:

> "Obviously when there are several claimants who may proceed in rem against a vessel, and the aggregate of their claims may be greater than its value, and there is

need of an apportionment among them, this court alone has the requisite jurisdiction; and the statute and rule of the Supreme Court provides the method and machinery to effectuate the object desired.

Courts of common law jurisdiction are inadequate for that purpose; but where there is only a single claim, and there is no need of an apportionment of the proceeds of the vessel among several claimants, there does not appear to be any need to adopt the methods provided in such cases as demand the peculiar and exclusive jurisdiction of the court of admiralty. An answer setting up the limitation of liability under section 4283 is all that is necessary to give to the owner of the vessel the relief to which he is entitled."

It is somewhat significant that the opinion goes on to cite two decisions of this Court, *The Scotland,* 105 U.S. 24 (1881), and *The Great Western,* 118 U.S. 521 (1886), in which it is held that the limitation of liability may be set up in two ways, one of them the assertion by way of defense in an action brought against the vessel owner.

This Court, citing *The Lotta,* has on at least two occasions recognized the vessel owner's right to plead the limitation of liability defense in an action filed against him in a state court. In *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255 (1922), the following appears at page 260:

"In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading."

In the case of *Langnes* v. *Green,* 282 U.S. 531 (1931), to which we will make later reference in this brief, the following appears at page 540:

"Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its

common law powers, was competent to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject."

These cases would certainly appear consistent with those cited in Part B of this brief which uphold the common sense proposition that the parties in a maritime case should have the same rights and responsibilities irrespective of the particular court, state or federal, in which the action happens to be brought. Certainly, it would be uneven justice if a litigant, in this case a defendant, was given a certain substantive right if the case happened to be brought against him in a federal court but be deprived of that right if the case happened to be brought against him in a state court.

In a multiple claim situation a state court, not being a true admiralty court, is without the procedural machinery to handle the proceedings which would be required. This is recognized in the above-quoted excerpt from *The Lotta.* However, in a single claim situation this procedural variance is of no moment, and there is no logical reason why there should be a difference in the treatment which the litigants receive, as to a substantive right, depending solely upon the plaintiff's choice of forum. Consequently, the availability of the limitation of liability defense in a state court, at least in a single claim situation such as the instant case, would appear to be dictated by logic as well as precedent.

D. The Vessel Owner may Claim Limitation of Liability by Answer, Irrespective of the Six Month Provision of Section 185

As we mention on page 6 hereof, the only notice referred to by Mrs. Abel in the District Court was January 30,

1974. The raising of the limitation of liability defense in the defendant's answer in Common Pleas Court was within six months of that date, and it would appear that Mrs. Abel's contention in the District Court was that the significance of the six month provision was with respect to the commencement of the action in the District Court after the state court had yielded jurisdiction. However, as we have also pointed out previously, in a memorandum in the state court, reference was made to notice allegedly given to the insurer of Cincinnati Gas & Electric Company as early as March 4, 1973. If that date is to be considered the date of the notice, the filing of the answer in the Hamilton County Common Pleas Court would have been beyond the six month time period. It is our contention that the same result should follow regardless of which date is considered as the date of the written notice mentioned in Section 185. Even though the District Court assumed that the notice date was January 30, 1974, we have included the following argument and authorities to establish our contention that error was committed in the court below even if the answer filed in the state court action came more than six months after the filing of written notice of claim.

As we pointed out on page 3 of this brief, the six month requirement as to the limitation of liability right appears *only* in 46 U.S.C. 185. That statute refers *only* to a petition filed in the United States District Court by a vessel owner, and *not* to all instances in which a vessel owner might assert his right of limitation of liability provided for in 46 U.S.C. § 183 (a).

It is our contention that the invocation of the limitation of liability right in the answer of the vessel owner in the Common Pleas Court was under Section 183 (a), and had nothing to do with Section 185. It is our position that there are at least two ways in which a vessel owner may

exercise his right to limit the claim to the value of the hull and cargo. One of them, particularly appropriate where there are numerous claims, is the assertion by the vessel owner in an independent proceeding which may be filed even before actions are commenced against him. This is Section 185. The other avenue which a vessel owner may take, at least in a single claim situation such as the present case where no "concursus" is needed to give the vessel owner the statutorily provided relief, is to await the commencement of litigation against him, after which he may, by answer, set up the limitation of liability right as a defense. In the case at bar, this is exactly what we sought to do in the state court at the earliest opportunity.

The six month provision of Section 185 was not enacted until 1936. Therefore, it is necessary to look at cases decided since that time to determine whether the foregoing conclusions are correct. The leading authority in this area is *The Chickie*, 141 F.2d 80 (3d Cir. 1944). In the opinion of the Third Circuit in that case, it is pointed out that a vessel owner's statutory right to limit his liability has existed since 1851. Later, in the case of *Norwich Company v. Wright*, 13 Wall 104 (1871), Mr. Justice Bradley suggested that a ship owner could avail himself of such a right by petitioning a competent court for limitation of liability, and subsequently this Court promulgated rules of procedure for such a proceeding. Still later, the Congress enacted legislation on the same procedure, but Mr. Justice Bradley, in *The Scotland, supra*, made it quite clear "that the Admiralty Rules of the Supreme Court were not intended to restrict ship owners in claiming the benefit of the limitation of liability statute, but to aid them and held that where all parties injured are represented as libelants or intervenors in an action, the defense of limited liability could be made by answer and was adequate to give the ship owners all the protection they deeded."

The foregoing discussion appears on page 85 of *The Chickie* opinion, and is followed by this language:

> "These two methods of claiming limitation of liability have been available to ship owners ever since. Until 1936 there was no time limit in the statute. The 1936 Amendments did not abolish the right of a ship owner to plead limitation in his answer; both methods are still available thereunder. What may be termed the substantive section of the statute, § 3 of the 1851 Act, which gave the ship owner the defense of limitation of liability, is still in force, without any express time limitation in it. See § 183 (a). The six months limitation was inserted only in what may be called the procedural section. § 185.
>
> We think it is abundantly clear, in view of the historical development of the statute, that the time limitation put in § 185 by the 1936 Amendment and made expressly applicable to a proceeding by petition at the suit of the owner, is not to be read into § 183 (a) by implication, particularly in view of the fact that both sections were simultaneously amended in 1936. To read the time limitation into § 183 (a) would militate against the well settled rule that the courts are to construe the statute liberally. It would tend, without an express declaration by Congress, to increase the economic burden of ship owners, thus placing them at the competitive disadvantage which the statute sought to avoid."

It would appear, therefore, that the raising of the limitation of liability by the Seventh Defense of our answer in the Common Pleas Court was entirely proper (and could not be attacked as untimely) because it was justified by Section 183 (a) and was not subject to the provisions of Section 185.

Still another strong authority for our position is *Deep Sea Tankers* v. *The Long Branch*, 258 F.2d 757 (2d Cir. 1958). At page 772 of its opinion, the Second Circuit arrives at exactly the same conclusion as did Judge Goodrich of the Third Circuit in the earlier case, with these words:

> "There is, however, a separate and distinct procedure by which a shipowner may limit his liability in accordance with 46 U.S.C.A. § 183 (a). A shipowner may institute a separate proceeding by the filing of a petition for limitation or he may plead the limitation statute, 46 U.S.C.A. § 183 (a), in his answer as a defense to suit against him. See 3 Benedict on Admiralty (6th Ed. 1940) Section 508."

After citing *The Chickie*, Judge Medina of the Second Circuit also refers to the history of the statute and the option of Mr. Justice Bradley in *The Scotland*. Then, at pages 772 and 773, he says this:

> "In practice it developed that the proceeding by way of petition for limitation of liability was often a source of delay and circuity of action, because shipowners did not institute this independent proceeding until after the question of liability had been litigated and determined against them. To alleviate the abuses inherent in this situation, the Congress, on June 5, 1936, amended Section 185 to require that a petition for limitation must be filed within six months of notice of claim.
>
> Section 185, as amended, does not refer to Section 183 (a), and no reason has been advanced by appellants for making the right to limitation as provided in Section 183 (a) subject to the six months time bar. Indeed, the Congress amended both Section 183 (a) and Section 185 simultantously in 1936 without specifying any time limit in Section 183 (a). Moreover, the abuses which resulted under Section 185 prior to its amendment are not encountered when limitation is pleaded by way of answer, because the libelant, by filing its

> libel, controls the time within which the remedy must be invoked. Therefore, in accord with The Chickie, supra, we hold that the Metropolitan plea of limitation in its answer was not barred by the six month time limit of 46 U.S.C.A. § 185."

Other cases with similar results include *DeCrus* v. *Hiering*, 47 A.M.C. 1722, 69 F.Supp, 397 (D. N.J. 1947); *Cutger* v. *United States*, 169 F.Supp. 104 (N.D. Fla. 1958); and *Baham* v. *Atlantic Gulf & Pacific Co.*, 333 F.Supp. 680 (E.D. Pa. 1971). In addition, there are two cases which deny motions to amend an answer at a very late date but which recognize the correctness of raising the limitation of liability under Section 183 (a) by answer. They are *Yates* v. *Dann*, 167 F.Supp. 882 (D. Del. 1958), and *Petition of Indiana Farm Bureau Cooperative Assn.*, 235 F. Supp. 800 (S.D. Ill. 1964). These cases would indicate that the only time consideration under Section 183 (a) is laches, something which cannot be invoked in the present case because the defense was asserted in the original answer.

In the event it is suggested that the rule ought to be otherwise where the claimant's action is filed pursuant to the "saving to suitors" clause, we cite the case of *Murray* v. *New York Central R. Co.*, 287 F.2d 153 (2d Cir. 1961), aff'g 171 F.Supp. 80 (S.D. N.Y. 1959), in particular page 154 of the Second Circuit's opinion where the following language appears:

> "The appellant's attempt to distinguish the rule of *The Chickie* because that was a suit in admiralty is wholly unconvincing. If limitation may be pleaded as a defense beyond the six month period, it would be unreasonable to make its unavailability turn on whether a plaintiff elects to bring suit on the admiralty side or the civil side of the court."

The court of Appeals found *Murray* "to be persuasive,

but not conclusive." The opinion of Judge Lively takes the position that, even though the second circuit went to the trouble of specifically enunciating the above holding that it was immaterial (for limitation of liability purposes) that the original claim was filed on the "civil side" of the court and not on the "admiralty side", the case was, by virtue of a maintenance cause of action in the complaint, already on the "admiralty side" of the District Court anyhow (whether that court or the Second Circuit knew it, or not).

Judge Lively then makes what is perhaps the most important series of statements in the opinion of the Court of Appeals when he says:

> "Furthermore, the entire case was before the district court from its inception. It is apparent that there is a difference, in terms of jurisdictional considerations, between transferring an issue for separate trial from one division or 'side' of a single court and transferring it for separate trial in an entirely different court system. This is the jurisdictional obstacle which the district court found impassable in this case, as did the court in *Ohio River Co.* v. *City of Wheeling*, 225 F.Supp. 733 (N.D. W.Va. 1964)."

This argument, we submit, fails to come to grips with what we believe to be the very fundamental basis for the procedure followed by the Petitioner in this case (and also a very compelling reason why this Court should take jurisdiction of this case on its merits). We refer to the series of decisions by this Court which are discussed on pages 10 through 13 of this brief and which make it unmistakably clear that the same uniform body of substantive admiralty law is to be applied in maritime cases regardless of the particular court, be it federal or state, where the case happens to be pending.

It is immensely significant, we submit, that even though Part B of the argument section of this brief was also Part B of the argument section of our brief in the Sixth Circuit, the opinion of that court makes no attempt whatsoever to discuss the argument based upon the necessity for uniformity in substantive admiralty law. In fact, not one mention is made in the Sixth Circuit's opinion of any of those cases.

The lack of any mention of the substantive uniformity argument suggests to us that there is, indeed, no valid response to our contention that the decisions of the courts below in the case at bar would, as to a vessel owner's right to limit his ability, torpedo the uniform substantive law doctrine. We say this because, if we are correct in the assertion set forth in Part B of this argument, then the vessel owner ought to be able to invoke the same substantive right (limitation of liability) whether the action happens to have been filed as one in admiralty in the district court, as a civil action in the district court, *or* in a state court.

In view of the foregoing discussion, we believe that it is obvious that, even if the notice of claim has been given more than six months before the raising of the limitation of liability defense, the defendant-vessel owner ought still to be entitled (in whatever court he might be in) to assert the right guaranteed him by Section 183 (a) without regard to the time limitation imposed by Section 185.

E. When a Vessel Owner's Right to Limit His Liability in a State Court Proceeding is Challenged by the Claimant, Thus Depriving that Court of Jurisdiction on that Question, Section 185 does not Bar the Vessel Owner from Invoking the Jurisdiction of the United States District Court for a Determination of that Issue

One point as to which there has been no dispute in this case is the belief that, once the *right* of the defendant to raise the limitation of liability defense was challenged in the Hamilton County Common Pleas Court, that court had no jurisdiction to consider the limitation of liability defense further (although one is now tempted to suggest that the decision of the Court of Appeals has re-opened that question and has implied that the only fair result would be to permit the state court to handle *all* questions with respect to a vessel owner's right to limit liability). In any event, all of the parties in the state court recognized what they saw as a lack of jurisdiction, and the state court acted accordingly, as is evidenced by the order staying proceedings (Appendix G).

The action which the vessel owner filed in the Southern District of Ohio was obviously not brought as an independent limitation proceeding. The complaint went to great pains to demonstrate that its filing was precipitated by events in the state court. All significant filings in the still pending state court action were referred to, and copies were attached. The complaint makes it quite clear that the *only* reason and justification for its filing was the impasse reached in the Common Pleas Court when that proceeding could progress no further owing to the lack of jurisdiction on the question of the vessel owner's right to limit his liability.

The authority for the invocation of the District Court's admiralty jurisdiction in such a situation lies in two decisions of this Court arising out of the same incident, *Langnes* v. *Green, supra,* and *Ex parte Green,* 286 U.S. 437 (1932). The impact of those cases may be summarized as follows:

1. Both a federal court and a state court would have jurisdiction of the present plaintiff's claim, the latter under the saving to suitors clause.
2. A ship owner must assert his right to limit his liability by setting it up in an answer in a state court proceeeding.
3. If a ship owner does so and also initiates a proceeding in the United States District Court whereby he attempts to enjoin proceedings in the state court because of the exclusive admiralty jurisdiction of the United States District Court, the federal trial court abuses its discretion by automatically enjoining proceedings in the state court. The reason for this holding is that, so long as there is no challenge on the part of the plaintiff of the ship owner's right to limit his liability, the plaintiff ought not to be deprived of his selection of the state court, with its jury trial.
4. However, if the plaintiff contests the right of the defendant-ship owner to limit his liability, a state court is wholly without jurisdiction to make a determination on that question, such jurisdiction being vested exclusively in a pure admiralty court, that is, the United States District Court. Therefore, the vessel owner must, at that point, bring his case before the United States District Court for a determination of the limitation question.

The District Court refused to accept these two decisions as authority for assuming jurisdiction in this case because they were handed down before the enactment of Section 185 in 1936. The Court of Appeals agreed. We point out, however, that the two *Green* decisions have nothing

whatsoever to do with a time limitation. They support our series of propositions in two other respects. First, they uphold the right of a vessel owner to assert the limitation of liability defense in a state court proceeding; secondly, they recognize that, when such right is challenged, such vessel owner has nowhere to turn, except to the only "pure" admiralty court, the United States District Court, for a vindication of his substantive right to do so in the state court.

Even though the two *Green* decisions were handed down prior to the 1936 amendment which produced what is now Section 185, it should be pointed out that in Gilmore & Black, The Law of Admiralty, Second Edition (1975), at page 869, the two *Green* cases, which we attempted to follow in invoking the jurisdiction of the District Court, are described in these words:

> ". . . they remain the *essential gospel* on the handling of single claim cases where plaintiff elects to sue at common law and defendant seeks to move the case into admiralty by petition for limitation." (Emphasis supplied.)

In oral argument to the Court of Appeals, we suggested that an affirmance of the District Court would be tantamount to re-writing that "gospel," something which any court should undertake only with much prayerful caution. We believe that our concern was well founded inasmuch as we perceive several inconsistencies in the opinion of the Sixth Circuit in the case at bar.

First, immediately after the discussion of the *Murray* case cited on page 20 hereof, Judge Lively makes these comments:

> "We note also that the strongest argument in *Murray* related to the desirability of disposing of all issues in a single legal proceeding. This may be achieved in a case such as this one only in a federal court. When the

right of limited liability is contested it becomes impossible to dispose of all the issues in a single proceeding in a state court."

While resolution of all issues in one court is always, of course, desirable, it is not the primary goal. In fact, the two *Green* decisions specifically approve the assumption of jurisdiction by the United States District Court for a determination of the "pure" admiralty question of one's right to limit his liability and the subsequent return of the case to the state court for a resolution of the merits of the case, in other words, not just one "transfer" of jurisdiction, but two.

The "re-writing" of the *Green* gospel was specifically accomplished when the Court of Appeals announced this precedent:

> "The procedure which the Supreme Court prescribed in *Langnes* v. *Green, supra,* modified to reflect the six months provision of Section 185, remains the preferred way of dealing with a contested issue of limitation of liability where the case has originated in a state court. At the time the owner files a petition under Section 185 he may make a motion to stay proceedings on his petition until it is determined whether it will be necessary to decide the limitation question. If the right to limitation is not contested in the state court and a final judgment is entered there without the necessity of litigating the limitation issue, the Section 185 proceedings in the district court can then be dismissed."

Several comments suggest themselves at this point. First, more than six months may have elapsed before a claimant files his state court action. Therefore, the "prudent" vessel owner must, under the Court of Appeals' reasoning, in many instances run the risk of stirring up an otherwise dormant claim by filing his Section 185 action in the

United States District Court *before* the claimant ever files any action in any court.

More basic, however, is the lack of justification, legislative or judicial, for the Court of Appeals' "modification" of this Court's *Green* procedure.

As for the lack of legislative justification, we point to these words in Judge Lively's opinion:

> "Knowing of previous decisions permitting the right to limited liability to be raised by answer in state court proceedings, Congress could have provided for the continuance of this procedure with a reasonable time limit."

We believe that the Congress has given a clear signal that this argument is not valid. We cite Rule 82 of the Federal Rules of Civil Procedure which reads as follows:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9 (h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93."

This case does not fall within the exception in the second sentence of the Rule. Therefore, we submit that the Section 185 argument must also fail because, in effect, the claimant is attempting to use Supplemental Rule F and Section 185 to limit the jurisdiction of the District Court, it being well recognized by the courts that there have always been, and continue to be, two separate and parallel methods of raising the limitation of liability defense — at least in a single claim situation. Thus, it was Section 183 which entitled the Petitioner to include limitation of liability as a defense in its answer in the state court, and the same statute was sufficient, we submit, to give the District Court jurisdiction in this case under the method

approved by this Court in the two *Green* decisions upon the presentation of a challenge to such right in the state court.

We contend that there is also no "judicial" justification for the Sixth Circuit's modification of the *Green* "gospel" because the same separate and parallel limitation of liability machinery previously referred to has been approved by various courts since 1936 beginning with the Third Circuit's decision in *The Chickie*. It is also important, we believe, to recognize that at the time of the two *Green* decisions the language of Section 185 was quite different than now, although the language of the then-Section 183 was essentially the same as today's Section 183 (a). As quoted on page 533 of 282 U.S., the then-Section 185 read as follows:

> "It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

That part of today's Section 185 which brings in the six-month requirement was nowhere to be found in the statutes at that time. Therefore, the jurisdiction of the District Court to entertain (in 1928) the sort of action which we filed in the case at bar must have rested in other language to be found in the then-Sections 183-185. If that 1928 language was sufficient to give the District Court jurisdiction to accomplish the limited purpose of resolving the sole question of the vessel owner's right to limit his

liability, then that same language (for example, that in Section 183) ought to be sufficient now to extend jurisdiction to the District Court for the same purpose. In other words, what was an ample jurisdictional basis in 1928 ought still to be an ample jurisdictional basis, at least under the particular circumstances of the case at bar where the invocation of the District Court's jurisdiction was not the initial raising of the defense of limitation of liability and was sought only after an impasse was reached in the state court on that point.

This approach is completely consistent with those post-1936 decisions which have held that the enactment of the additional language in Section 185 relied upon by the Respondent and the courts below did not extinguish the right to utilize Section 183 as a defense. We believe that the District Court in the present case ought to have assumed jurisdiction under Section 183, at least for the limited purpose of making a determination of the Petitioner's right to limit its liability, after which the case could have been returned, as this Court suggested in the two *Green* decisions, to the state court for all further proceedings.

Furthermore, if the decisions in the courts below are permitted to stand, the consequences will be far reaching, even to the point of nullifying, for all practical purposes, the right to raise the limitation of liability defense by answer. We say this because, until an action is filed, it is impossible to determine whether it will be brought in the state court or the federal court. Yet, there appears to be no recognized authority challenging the decisions cited on pages 17-20 of this brief which allow the vessel owner the option of raising defense under Section 183 (a) by answer. Gilmore & Black, at page 855 of their work, conclude that the pre-1936 practice of recognizing that

option has continued to prevail. They then cite the recent opinion of Mr. Chief Justice Burger in *M/S Bremen and Unterweser Reederei GMBH* v. *Zapata Offshore Co.*, 407 U.S. 1 (1972). In that case the Chief Justice appeared to recognize a position completely consistent with that which we have asserted but also referred to the choice which the vessel owner's counsel must make as "hazardous." This has prompted Gilmore & Black, at page 857 of their work, to make the following comment:

> "It is hoped that the Chief Justice's language will not be used by overzealous counsel to suggest that the entirely satisfactory rule of the Chickie is in any way open to doubt."

The decisions of the courts below, if permitted by this Court to stand, will not only case "doubt" upon the rule of *The Chickie*; they will virtually obliterate it. Even in a single claim situation, counsel for a vessel owner could no longer delay the assertion of the limitation of liability defense until the filing of an answer, because there would always be the concern that the claimant might file his action in a state court. If the claimant then resists the assertion of the defense in that court, by claiming that the six months limitation is inapplicable or for some other reason, then the vessel owner can no longer rely on the two *Green* cases which heretofore have seemed the perfect solution for such a situation. The only course which a prudent vessel owner can follow in the light of the decisions below is to invoke the jurisdiction of the United States District Court within six months after his first notice of claim, whether he has been sued at that time or not.

The decision of the District Court has been reported in 1975 AMC 1724. Its implications, especially after the affirmance by the Court of Appeals, will not be lost upon

the maritime bar, particularly in the light of the clear holding that the "only" method available to the Petitioner to have limited its liability in the present case would have been a timely District Court filing under Section 185, that being "the prudent thing for him to do" as "an *anticipatory* protective measure." Otherwise, says the opinion of Judge Lively, "an owner who receives a notice of a claim acts at his peril if he fails to file a petition for limitation in a federal court within six months."

One can expect, therefore, that the already overburdened dockets of the district courts will now be further increased (unnecessarily and unjustifiably, in our opinion) by the filing of petitions to limit liability in every case where a vessel owner is concerned that he might be the victim of the same chain of events as was Cincinnati Gas & Electric Company in the present case. That will include virtually every case in which it might at some time be considered desirable to attempt to limit liability, because in almost every situation the possibility of a state court action (in the state of the defendant's citizenship or principal place of business, thus eliminating removal) will exist.

CONCLUSION

We urge this Court, therefore, to take jurisdiction of this case on its merits so that it can reverse the decision of the courts below and return this case to the District Court for a determination of the limited question of which that Court, in our view, has jurisdiction.

The Petitioner relied upon previous decisions of this Court in attempting to invoke the jurisdiction of the District Court as it did. The Court of Appeals, acknowledging the closeness of the question, held that those decisions had been modified. Therefore, we submit that this situation presents an especially compelling case for

this Court to grant certiorari. We believe that this is particularly so when it is realized that, under the decisions of the courts below, there now exists the obviously non-uniform and basically unfair situation where the owner of vessel A, who is sued in the United States District Court, can, after the expiration of the six month period provided in Section 185, effectively raise the limitation of liability defense simply by including it in his answer, even if the case happens to be filed on the "law" side of the District Court; whereas the owner of vessel B, sued for precisely the same kind of incident in a state court, cannot do so because, if more than six months have elapsed since receipt of notice of claim, he is in jeopardy of suffering the same fate as Cincinnati Gas & Electric Company in the present case.

Because of the combination of the Sixth Circuit's holding that two previous decisions of this Court had been modified and the clear departure from this Court's drive toward uniformity in substantive admiralty law, we believe that this petition for a writ of certiorari clearly ought to be granted.

Respectfully submitted,

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APPENDIX A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-743423

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,
1001 Front Street, New Richmond, Ohio,
Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.,
a corporation,
Fourth and Main Streets, Cincinnati, Ohio 45202

and

NEW RICHMOND FERRY, INC.,
New Richmond, Clermont County, Ohio, 45157,
Defendants.

COMPLAINT AND JURY DEMAND

(Filed May 7, 1974)

FIRST CAUSE OF ACTION

PATRICIA ABEL, Plaintiff, says that she is doing business as New Richmond Boating Center, and that defendant, Cincinnati Gas and Electric Company, is a corporation, as is defendant, New Richmond Ferry, Inc. Plaintiff avers as follows:

1. Plaintiff is, and was at the times hereinafter mentioned, a proprietorship doing business as New Richmond Boating Center, wholly owned by Patricia A. Abel, with principal office and place of business located at 1001 Front Street, New Richmond, Clermont County, Ohio.

2. Cincinnati Gas & Electric Company is an Ohio corporation with principal office and place of business located at Fourth and Main Streets in Cincinnati, Hamilton County, Ohio, and operating a power plant on the Ohio River in Clermont County, Ohio, and is the owner and operator of the tugboat, M/V KILOWATT.

3. New Richmond Ferry, Inc. is and was at all times mentioned herein a corporation organized and existing under the laws of the State of Ohio, with principal office in New Richmond, Clermont County, Ohio, and its statutory agent is Stephen A. Durkee, P. O. Box 127, New Richmond, Ohio, 45157, and which is the owner and operator of a Ferry plying the Ohio River between New Richmond and Kentucky.

4. At 1001 Front Street, to the Ohio River, in New Richmond, Ohio, plaintiff operated a marina for the harboring of pleasure craft and other vessels plying the waters of the Ohio River and selling fuel, oil, merchandise, and other equipment to the public and operators of pleasure craft.

5. Plaintiff, her family and employees, constructed said marina through the years, commencing at about 1960, developed and operated a highly profitable and successful business, which said profits and business increased yearly up to the time of the occurrence hereinafter mentioned.

6. On or about July 7, 1972, at about 11:15 P.M., the unattended FERRY broke loose and became disengaged from its mooring on the Ohio side of the Ohio River, and

drifted downstream with the current, and, not under power, ran into and collided with plaintiff's marina, breaking cables and otherwise damaging said marina and its floats as hereinafter described.

7. While plaintiff's agents were replacing one of the cables broken by the FERRY, and connecting the center float with the land, the defendant's tug KILOWATT, under power, came upstream on the Ohio River and collided with and hit the plaintiff's workboat and other equipment. This ramming by the KILOWATT was repeated three times, the last of which tore the entire harbor loose, breaking all of the cables and bending two large spuds in the lead boat and one at the rear of the harbor. Catwalks were twisted, torn loose, and dropped into the river; all gas lines, water lines, main electric service were torn loose, and the harbor started downstream and floated approximately 150 feet, whereupon temporary lines were secured, thus saving said marina from immediate total loss.

8. Defendant, New Richmond Ferry, Inc., was negligent in not securely tying its FERRY to the shore with adequate cables, and by using frayed and worn rope, thus permitting said FERRY to break loose and drift into plaintiff's marina entirely unattended.

9. Defendant, Cincinnati Gas & Electric Company, was negligent in the operation of its tug, repeatedly fouling, striking, ramming, and colliding with plaintiff's marina and workboat.

10. As a direct and proximate result of the aforesaid negligent conduct of both defendants, New Richmond Ferry, Inc., and Cincinnati Gas & Electric Company, plaintiff is entitled to recover from them individually the total sum of Four Hundred Thirty-eight Thousand, Six Hundred

Fifty ($438,650.00) Dollars, with interest, as hereinafter set out in causes of action Two and Three.

SECOND CAUSE OF ACTION

11. Plaintiff repeats all of the allegations of the First Cause of Action herein contained, and says that as the result of the negligence and carelessness of defendant, New Richmond Ferry, Inc., the following damage was sustained by defendant:

Center Cables	$ 200.00
Upstream floats	800.00
Spuds	1,600.00
Rope	150.00
Miscellaneous bridge damage	900.00
	$3,650.00

All of the aforesaid damage could and would have been repaired forthwith and plaintiff would have suffered little or no loss of use and business as the result thereof.

13. Plaintiff prays damages against defendant, New Richmond Ferry, Inc., in the sum of Three Thousand, Six Hundred Fifty ($3,650.00) Dollars, with interest from July 7, 1972, and her costs.

THIRD CAUSE OF ACTION

13. Plaintiff repeats all of the allegations of the First cause of Action herein contained as if fully rewritten herein, and says that as a result of the negligence and carelessness of defendant, Cincinnati Gas & Electric Company, as alleged in paragraphs 7 and 9 hereof, the entire harbor and marina were torn loose, breaking all of the remaining cables, irreparably bending the two large spuds on the lead boat

and one at the rear of the harbor; twisting and tearing loose the catwalks, all gas lines, water lines, and main electric service, all to the damage of the plaintiff in the total sum of Two Hundred Ten Thousand ($210,000.00) Dollars.

14. As a further result of the above alleged negligence and carelessness of defendant, Cincinnati Gas & Electric Co., plaintiff was deprived of the use of said marina for the remainder of the 1972 boating season and the profits therefrom, due in a considerable extent to the lack of capital funds to rebuild the marina, which loss of profits and business would have approximated Seventy-five Thousand ($75,000.00) Dollars.

15. Plaintiff is and was unable to finance the reconstruction of said marina, and therefore lost all the business and profits for the year 1973, all to her loss in the sum of Seventy-five Thousand ($75,000.00) Dollars.

16. Plaintiff is still unable to finance the reconstruction of said marina, and therefore will lose all the business and profits for the year 1974, even if immediate financing were available, because booking arrangements by marina customers are completed by the time of the filing of this action, and thus she will lose all of the profits and the incidental business arising out of the harbor rentals, all to her loss in the total sum of Seventy-five Thousand ($75,000.00) Dollars.

17. Plaintiff prays damages against defendant, Cincinnati Gas & Electric Company, in the sum of Four Hundred Thirty-five Thousand ($435,000.00) Dollars, with interest, and her costs.

18. If plaintiff cannot reconstruct and re-establish her marina business, her damages will increase at the rate of

Seventy-five Thousand ($75,000.00) Dollars a year for the year 1975 and each year thereafter.

WHEREFORE, Plaintiff prays for judgment in the sum of Three Thousand, Six Hundred Fifty ($3,650.00) Dollars against defendant, New Richmond Ferry, Inc., with interest from July 7, 1972, and for judgment against defendant, Cincinnati Gas & Electric Company in the amount of Four Hundred Thirty-five Thousand ($435,000.00) Dollars, together with interest and costs, reasonable attorneys' fees, and such other relief as this Court may deem appropriate.

WAITE, SCHINDEL, BAYLESS & SCHNEIDER

By .....

Philip J. Schneider
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
Telephone – 621-0267

DEMAND FOR JURY

With the filing of this action, plaintiff demands that this cause be tried before a jury of ..... persons.

WAITE, SCHINDEL, BAYLESS & SCHNEIDER

By .....

Philip J. Schneider
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
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APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[TITLE OMITTED]

ANSWER AND CROSS CLAIM OF DEFENDANT CINCINNATI GAS & ELECTRIC CO.

ANSWER

(Filed June 19, 1974)

Now comes the defendant, Cincinnati Gas & Electric Company, and for its answer to the plaintiff's complaint, admits, denies and avers as follows:

* * *

SEVENTH DEFENSE

11. This answering defendant repeats, as if fully set forth herein, all the admissions, denials and averments of the first through the sixth defenses of this answer.

12. This answering defendant avers that, as of the times referred to in the plaintiff's complaint, the M/V Reddy Kilowatt was a steel hull, twin screw, 440 horsepower diesel tugboat with a length of 52 feet, a beam of 20 feet, and a depth of 6.5 feet. Her gross tonnage was 40.59 tons. She was built in 1962 by Maxon Shipyard at Tell City, Indiana.

13. The voyage during which the incident referred to in the plaintiff's complaint occurred began on or about

11:00 P.M. on July 7, 1972, and ended sometime during the morning hours of July 8, 1972. There are no other demands, claims, liens or claim of lien pending against the said vessel, to the knowledge of this answering defendant, with respect to the aforesaid voyage or any other voyage, except those set forth in the plaintiff's complaint in the within action.

14. The said vessel was not damaged as a result of any of the events described in plaintiff's complaint. At the time and place referred to in the said complaint, the said vessel was not carrying any freight or passengers, and her value was in the sum of Fifty Two Thousand Five Hundred ($52,500.00) Dollars.

15. The said vessel remains in the ownership and possession of the answering defendant.

16. Any collision, loss, damage or injury resulting from any of the events described in the plaintiff's complaint were occasioned or incurred without the privity or knowledge of this answering defendant.

17. In the event this answering defendant shall be held liable for all or any part of any loss and damage claimed by the plaintiff in her complaint, this answering defendant, as owner of the M/V Reddy Kilowatt, claims the benefit of limitation of liability as provided for in Sections 4281, 4282, 4283, 4284 and 4285 of the Revised Statutes of the United States (46 U.S.C. # 181-185), and the various statutes supplementary thereto and amendatory thereof.

WHEREOF, having fully answered, the defendant, Cincinnati Gas & Electric Company, prays that the plaintiff's complaint be dismissed as to it and that it be permitted to go hence without day, and the said defendant further prays, in the event it is held liable for all or any part of the loss

and damage claimed by the plaintiff in her complaint, then that such liability be limited to the amount or value of this answering defendant's interest in the said M/V Reddy Kilowatt, and her pending freight and passage money as aforesaid at the end of the voyage on which the incident claimed by the plaintiff occurred.

* * *

[Certificate of Service Omitted]

James L. O'Connell
LINDHORST & DREIDAME
Attorneys for the Defendant,
Cincinnati Gas & Electric Company
1200 American Building
Cincinnati, Ohio 45202
421-6630

* * *

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[TITLE OMITTED]

MOTION OF DEFENDANT, CINCINNATI GAS & ELECTRIC CO., FOR PARTIAL SUMMARY JUDGMENT

(Filed September 6, 1974)

Now comes the defendants, Cincinnati Gas & Electric Co., and moves the Court for a summary judgment on the seventh defense of its answer, that is, for an order limiting any possible liability of the said defendant to the plaintiff to the value of the hull and cargo of the M/V "Reddy Kilowatt" as of July 7, 1972, to-wit, the sum of $52,500.00.

James L. O'Connell
LINDHORST & DREIDAME
Attorneys for the Defendant,
Cincinnati Gas & Electric Company
1200 American Building
Cincinnati, Ohio 45202
421-6630

[Supporting Memorandum Omitted]

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[TITLE OMITTED]

PLAINTIFF'S MEMORANDUM OPPOSING DEFENDANT CINCINNATI GAS & ELECTRIC CO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed September 24, 1974)

ARGUMENT

The defendant brings this motion for partial summary judgment for a determination of its extent of liability under the federal Limited Liability Act, 46 U.S.C., Secs. 181-196. Section 183 (a) of that Act provides:

> "The liability of the owner of any vessel . . . for any loss, damage, or injury by collision or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity of knowledge of such owner or owners shall not . . . exceed the amount of value of the interest of such owner in such vessel, and her freight then pending."

Under this section, an owner will be permitted to limit his liability only if the damage was occasioned without privity or knowledge on the part of such owner. Clearly, the owner seeking a limitation of liability has the burden of proving such absence of privity or knowledge. *The Marguerite,* 150 F. 2d 776 (1944) . Although the defendant, in its answer, asserts that the collision was occasioned with-

out the privity of knowledge of the defendant, this issue presents a question of material fact which should be left for the determination of the jury upon a full hearing.

Likewise, an owner will not be permitted to limit his liability where such owner was negligent in providing a competent master and crew for the vessel. *Petition of Tracy*, D.C., N.Y. 1950, 92 F. Supp. 706, affirmed 194 F.2d 362. The question of whether due care was exercised by the defendant in the choice of master (and crew) also presents an issue of material fact which should be reserved for the determination of the jury.

The plaintiff also contends that 49 U.S.C., Sec. 183, should be construed to limit the liability of the defendant only as to the direct physical damage suffered as a result of the collision. In this case, the amount of such damage to the plaintiff's marina was $210,000. In addition, the plaintiff claims that the negligence and carelessness of the defendant deprived her of the use of the marina for the remainder of the 1972 boating season and all of the 1973 and 1974 boating seasons, resulting in a loss of business and profits in the amount of $75,000 per year, or a total of $225,000 to date. The plaintiff also claims that if she cannot reconstruct and re-establish her marina business, she will suffer damages in the amount of $75,000 for the year 1975 and each year thereafter. 49 U.S.C., Sec. 183 should be construed to limit the liability of the defendant only as to the $210,000 damage done to the plaintiff's marina, and not to the loss of business and profits suffered by the plaintiff.

CONCLUSION

The plaintiff respectfully submits that to grant the defendant's motion for partial summary judgment at this time, without a full determination of the facts at trial, would be premature.

The plaintiff also submits that if defendant's motion for partial summary judgment is granted, the order of the court should be limited to those damages which were the result of the physical damage suffered by the plaintiff's marina, and should not extend to the loss of business and profits suffered by the plaintiff.

Respectfully submitted,

WAITE, SCHINDEL, BAYLESS & SCHNEIDER

By .....

Philip J. Schneider
Trial Attorney for Plaintiffs
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

[Certificate of Service Omitted]

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[TITLE OMITTED]

MOTION OF DEFENDANT, CINCINNATI GAS & ELECTRIC COMPANY, FOR STAY

(Filed November 5, 1974)

Now comes the defendant, Cincinnati Gas & Electric Company, and moves the Court that, if the plaintiff persists in questioning the right of the movant to seek a limitation of its liability under 46 U.S.C. # 183, all proceedings in the within action be stayed until such time as the movant shall have had an opportunity to have invoked the jurisdiction of the United States District Court for the Southern District of Ohio for a determination of such right and that Court shall have relinquished jurisdiction of these proceedings.

/s/ James L. O'Connell
James L. O'Connell

LINDHORST & DREIDAME
Attorneys for the Defendant,
Cincinnati Gas & Electric Company
1200 American Building
Cincinnati, Ohio 45202
421-6630

APPENDIX F

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[TITLE OMITTED]

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OPPOSING DEFENDANT, CINCINNATI GAS & ELECTRIC CO.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed November 11, 1974)

ARGUMENT

In addition to the arguments contained in its memorandum of September 24, 1974, plaintiff urges that the defendant C.G.&E.'s motion for partial summary judgment be denied on the following grounds:

(1) The Court lacks jurisdiction in this case to entertain the question of defendant's right to limit its liability under 46 U.S.C.A., Sec. 183 (a) ;

(2) The defendant's right to a limitation of liability is barred by the six-month limitation contained in 46 U.S.C.A., Sec. 185.

******

2. The Defendant's Right to A Limitation of Liability is Barred by the Six-Month Limitation Contained in 46 U.S.C.A., Sec. 185.

46 U.S.C.A., Sec. 185, as amended provides:

"The vessel owner, *within six months after a claimant*

> *shall have given to or filed with such owner written notice of claim,* may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter . . ." (Emphasis added).

The 1936 amendment to this section, which established the six-month limitation, was enacted for the purpose of cutting down the rights and privileges of shipowners by providing a time limit where one existed before: *The Grasselli Chemical Co. No. 4,* (D.C., N.Y.) 20 F. Supp. 394 (1937).

> "The language of section 185, set in the background of the legislation of 1936 relating to limitation proceedings, requires the construction that a petition for limitation of liability must be filed within six months after the first written notice shall have been given of a claim arising out of the particular accident or disaster in question. If the petition is not so filed, the shipowner's privilege of limiting liability is lost entirely in respect to all claims arising out of the accident or disaster." — *The Grasselli Chemical Co., No. 4, supra,* at p. 396.

Written notice of the plaintiff's claim against the defendant C.G. & E. was provided to the defendant's insurer as early as March 4, 1973. (See attached copy of letter of Neare, Gibbs & Co. acknowledging receipt of plaintiff's claim.) Written notice was also supplied directly to both defendants in this action, C.G. & E., and New Richmond Ferry, Inc., on January 30, 1974. (See copies of letter attached.) The defendant's right to a limitation of liability is therefore barred by the six-month limitation of 46 U.S.C.A., Sec. 185.

The defendant C.G. & E. will undoubtedly contend that

the six-month limitation does not bar a shipowner's right to assert his limited liability under 46 U.S.C.A., Sec. 183 (a), by way of defense raised on his answer. See *The Chickie,* 141 F. 2d 80 (1944); *Deep Sea Tankers, Limited* v. *The Long Beach,* (2d Cir.) 258 F. 2d 757 (1958). However, the cases supporting this argument all involved actions invoking the admirality jurisdiction of the federal courts.

A case very much in point to the present case is *Ohio River Co.* v. *City of Wheeling,* (D.C., W.Va.), 225 F. Supp. 733 (1964), a copy of which is attached for the Court's convenience. This case involved an action for damages to a public parking garage caused when a supporting pier was struck by a coal barge owned by the defendant. Following receipt of the plaintiff's written claim, the defendant took no affirmative action, but rather raised the defense of limitation of liability in its answer to the plaintiff's complaint filed in the State Court. The defendant, recognizing that the claimant's failure to admit its right to limited liability "ousted the State Court's jurisdiction to entertain the disputed questions, since they are within the exclusive purview of the court of admirality" (p. 734), filed a pleading in the federal district court, requesting that court to take jurisdiction of all questions involving the limitation of liability defense. The defendant argued that since the *Deep Sea Tankers* case, *supra,* established that the right to limited liability may be asserted by answer to a libel in admiralty more than six months after notice of a claim is received, then "the right to raise the defense by answer should subsist no matter how or where the vessel owner is attacked." (p. 734) The district court, however, refused to accept this argument and held that the doctrine announced in the *Deep Sea Tankers* case should be limited to its factual situation, i.e., permitting the invocation of the

Act as a defense in an action in the federal courts having admiralty jurisdiction.

* * *

Respectfully submitted,

.....

Philip J. Schneider
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
Telephone – 621-0267

[Certificate of Service Omitted]

APPENDIX G

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[TITLE OMITTED]

ENTRY DENYING MOTION FOR SUMMARY JUDGMENT AND GRANTING MOTION FOR STAY AS TO C.G.&E.

(Filed November 18, 1974)

This cause came on to be heard on the motion of the defendant, C.G. & E., for summary judgment, and to stay the proceedings herein pending its filing in the Federal Court seeking limitation of liability, the memorandums of counsel, the arguments of counsel, and was submitted to the Court.

Upon Consideration Whereof: the Court finds that the Motion for Summary Judgment is not well taken, and should be and hereby is overruled; and the Court does hereby stay proceedings herein until defendant, C.G. & E., files its proceedings in the United States District Court, Southern District of Ohio, Western Division, Provided, However, that defendant failing to file in such Federal District Court within thirty days after the entry hereof, this stay shall be null and void, and proceedings herein may continue.

Defendant excepts to the overruling of the Motion for Summary Judgment, and plaintiff excepts to the ruling conditionally granting a stay.

.....

Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-74-480

CINCINNATI GAS & ELECTRIC COMPANY, PLAINTIFF, OWNER OF M/V "REDDY KILOWATT" IN AN ACTION FOR EXONERATION FROM OR LIMITATION OF LIABILITY

COMPLAINT

(Filed December 3, 1974)

Now comes Cincinnati Gas & Electric Company, plaintiff herein, and, for its complaint against Patricia Abel, d/b/a New Richmond Boating Center, and New Richmond Boating Center, and New Richmond Ferry, Inc., in an action for exoneration from or limitation of liability, avers as follows:

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears.

2. The plaintiff herein is, and at all times pertinent to this action was, the owner and operator of the M/V "Reddy Kilowatt", a steel hull, twin screw, 440 horse power diesel tug boat, with a length of 52 feet, a beam of 20 feet, and a depth of 6.5 feet. Her gross tonnage was 40.59 tons. She was built in 1962 by Maxon Shipyard at Tell City, Indiana.

3. The M/V "Reddy Kilowatt" has not been attached or arrested. On May 7, 1974, an action was commenced in the Court of Common Pleas of Hamilton County, Ohio, being Case No. A-743423 on the dockets of the said Court, by Patricia Abel, d/b/a New Richmond Boating Center, against Cincinnati Gas & Electric Company (the plaintiff herein) and also against New Richmond Ferry, Inc. to recover damages alleged to have been sustained by the said Patricia Abel, d/b/a New Richmond Boating Center, as a result of an incident alleged to have occurred on July 7, 1972. A copy of the complaint in the said Case No. A-742423 is attached hereto as Exhibit "A". Also attached hereto are copies of all other pertinent pleadings by all parties in the said Case No. A-743423 as follows:

Exhibit "B" — Answer of New Richmond Ferry, Inc.

Exhibit "C" — Answer and cross claim of Cincinnati Gas & Electric Company.

Exhibit "D" — Answer of New Richmond Ferry, Inc. to cross claim of Cincinnati Gas & Electric Company.

Exhibit "E" — Motion of Cincinnati Gas & Electric Company for partial summary judgment (limitation of liability).

Exhibit "F" — Affidavit of C. William Kinzeler.

Exhibit "G" — Memorandum of Patricia Abel opposing motion for summary judgment.

Exhibit "H" — Motion of Patricia Abel to strike and for a more definite statement (As to Cincinnati Gas & Electric Company).

Exhibit "I" — Motion of Patricia Abel to strike and

for a more definite statement (as to New Richmond Ferry, Inc.).

Exhibit "J" – Motion of Cincinnati Gas & Electric Company for stay.

Exhibit "K" – Memorandum of Patricia Abel opposing motion for stay.

Exhibit "L" – Supplementary memorandum of Patricia Abel opposing motion for summary judgment.

Exhibit "M" – Memorandum of Patricia Abel opposing motion of Cincinnati Gas & Electric for stay.

Exhibit "N" – Memorandum of New Richmond Ferry, Inc. in opposition to motion to strike and for a more definite statement.

Exhibit "O" – Entry denying motion for summary judgment and granting stay as to Cincinnati Gas & Electric Company.

Exhibit "P" – Entry granting stay as to New Richmond Ferry, Inc.

4. The plaintiff repeats and re-avers all of the admissions, denials and averments of its filings in the said Case No. 743423, except that the plaintiff does abandon the Fifth Defense of its answer in the said case, the defense of laches, being Paragraph 8 of said answer.

5. There have been no changes in any of the matters alleged in the Seventh Defense of the plaintiff's answer in the said Case No. A-743423, Paragraphs 11-17 thereof, since the filing of the said answer.

WHEREFORE, the plaintiff prays for the following relief in this Court:

A. For judgment granting it exoneration from any liability or loss, damage or injury incurred by reason of casualty alleged by Patricia Abel in the aforesaid Case No. A-743423, or, if exoneration be denied, granting it limitation of liability to the amount or value of its interest in the said vessel and her freight pending, pursuant to statute.

B. Since a determination of the plaintiff's right to exoneration or limitation of liability will involve a determination of all or most of the issues raised by the pleadings in the said Case No. A-743423, for a full and complete determination of all issues between all of the parties in the said case as raised by the pleadings in the said case, including the relief prayed for in the plaintiff's answer therein (Exhibit "C" hereof).

C. For such other and further relief as may be just and proper in the premises.

D. For its costs herein expended.

/s/ James L. O'Connell
James L. O'Connell
Trial Atorney for the Plaintiff
1200 American Building
Cincinnati, Ohio 45202

OF COUNSEL:

LINDHORST & DREIDAME
1200 American Building
Cincinnati, Ohio 45202
421-6630

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[TITLE OMITTED]

CLAIM AND ANSWER

(Filed December 20, 1974)

Patricia Abel, d/b/a New Richmond Boating Center, hereby makes claim against plaintiff, Cincinnati Gas and Electric Company, for the full amount of her losses arising out of damages to her harbor, marina, and floats, and answers the Complaint of Plaintiff, Cincinnati Gas & Electric Company as follows:

CLAIM

* * *

12. By reason of the foregoing, Claimant hereby makes claim against the Plaintiff, Cincinnati Gas & Electric Company, in the amount of Four Hundred Thirty-five Thousand ($435,000.00) Dollars, together with interest and costs, reasonable attorneys' fees, and such other relief as the Court may deem appropriate.

ANSWER TO COMPLAINT

Claimant makes the following Answer to the Complaint of Plaintiff, Cincinnati Gas & Electric Company:

FIRST DEFENSE

13. The Complaint fails to allege sufficient facts which would entitle the Plaintiff to exoneration from or limitation of liability.

SECOND DEFENSE

* * *

THIRD DEFENSE

24. Plaintiff had privity and knowledge of the fault and neglect of the M/V "Reddy Kilowatt" and her crew.

FOURTH DEFENSE

25. Plaintiff's Complaint was not filed within the time provided by law for the filing of such actions. Under the provisions of the 46 U.S.C. Sec. 185, and Supplemental Rule F (1) of the Federal Rules of Civil Procedure, a complaint for limitation of liability must be filed not later than six months after receipt by the vessel owner of written notice of a claim. Written notice of this Claimant's claim was furnished to the Plaintiff by letter on January 30, 1974 (See Exhibit A attached) and by way of a Complaint filed on May 7, 1974, in the Court of Common Pleas of Hamilton County, Ohio, being Case No. A-743423 on the dockets of the said Court (See Exhibit B attached). Both written notices were received by plaintiff more than six months prior to the filing of the Complaint herein, and this action is therefore barred.

WHEREFORE, having fully answered, Patricia Abel, d/b/a New Richmond Boating Center, prays that exoneration from or limitation of liability be denied, that the Plaintiff's Complaint be dismissed at its costs, and that the case be remanded to the Court of Common Pleas of

Hamilton County, Ohio, where the original action still pends awaiting the action of this Court on the issue of limitation of liability.

/s/ PHILIP J. SCHNEIDER
Trial Attorney for Claimant
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

[CERTIFICATE OF SERVICE OMITTED]

EXHIBIT A TO CLAIM AND ANSWER

January 30, 1974

Cincinnati Gas & Electric Co.
Fourth and Main Streets
Cincinnati, Ohio 45202

Gentlemen:

Re: Patricia Able, d/b/a New Richmond Boating Center, v. C. G. & E. et al.

I have been employed to represent the above claimant, who sustained damage to her dock on July 7, 1972, due to the negligence of your boat, the Kilowatt, while assisting the Ferry Carrier, which had broken away from its mooring on the above date. The damage was very extensive.

I would be pleased to discuss the matter with your representative or your insurance carrier.

Yours very truly,

PJS:ch

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[TITLE OMITTED]

MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT BY CLAIMANT, PATRICIA ABEL d/b/a A NEW RICHMOND BOATING CENTER

(Filed February 14, 1975)

Claimant, Patricia Abel, d/b/a New Richmond Boating Center, moves the Court to dismiss these actions, or in the alternative to enter summary judgment in her favor, for the reason that neither of these actions was commenced within six months following the receipt of written notice of a claim as provided in 46 U.S.C.A. Section 185, and Supplemental Rule F of the Federal Rules of Civil Procedure.

/s/ PHILIP J. SCHNEIDER

Trial Attorney for Claimant,
Patricia Abel, d/b/a New
Richmond Boating Center
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

[SUPPORTING MEMORANDUM OMITTED]

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-74-480

CINCINNATI GAS & ELECTRIC COMPANY, PLAINTIFF, OWNER OF M/V "REDDY KILOWATT" IN AN ACTION FOR EXONERATION FROM OR LIMITATION OF LIABILITY

OPINION

(Filed July 8, 1975)

PORTER, J.:

This action arises on a complaint in admiralty for exoneration from or limitation of liability under the laws of the United States. There is an action pending in the Hamilton County Common Pleas Court by the claimant, Patricia Abel, against Cincinnati Gas & Electric Co. (hereafter "C. G. & E."), plaintiff here, to recover damages to her marina alleged to have occurred as the result of an incident July 7, 1972 when claimant's marina was struck by the vessel of C. G. & E.

It is undisputed on the part of C. G. & E. that claimant gave it notice of her claim by letter dated January 30, 1974. She then filed her action against defendants C. G. & E. and New Richmond Ferry, Inc., in state court on May 7, 1974. In its answer in the Common Pleas Court, C. G.

& E. alleged its right to limit liability under U. S. Statutes 46 and U.S.C. § 181-185. The complaint in the present action was filed in this Court December 3, 1974.

Claimant Patricia Abel here moves for a dismissal, or in the alternative, for summary judgment, against the complaint of C. G. & E., asserting that the action is barred because it was not commenced within six months following the receipt of written notice of a claim as required by 46 U.S.C. § 185, and Supplemental Rule F of the Federal Rules of Civil Procedure.

There is no question that in both the statutory section and the rule relied upon by claimant, that a provision is made that a petition for limitation of liability must be filed within six months after a claimant gives written notice of a claim to the vessel owner. Further, there is no dispute that C. G. & E. did not file its petition (complaint) in this Court within six months after the January 1974 notice.

It is the position of C. G. & E. that the case here pending is not a new action, but is a continuation of the action pending in Common Pleas Court where the defense of limitation of liability was raised in the answer of C. G. & E., and further that C. G. & E. is proceeding under 46 U.S.C. § 183 in which the six-month period is not mentioned, rather than 46 U.S.C. § 185. The answer of C. G. & E. was filed in the Common Pleas Court June 19, 1974, within six months of claimant's notice, so that it would appear that C. G. & E. really is making two distinct arguments here. The first is that limitation was timely sought under the six-month rule. The second is that the six-month rule is inapplicable because C. G. & E. is proceeding under a section of the Act, 46 U.S.C. § 183, which does not include the six-month requirement. Two issues are thus presented:

1. Can a suit by a vessel owner in this Court for

limitation of liability be regarded as a continuation of a suit commenced in state court by a claimant, or otherwise stated, can a plenary suit in this Court for limitation of liability be regarded merely as a continuation of state court litigation where limitation of liability is first set up in the answer in the state court proceeding.

2. Is a limitation of liability suit under 46 U.S.C. § 183 free of the six-month requirement of 46 U.S.C. § 185 and Supplemental Rule F.

We conclude that these questions must be answered in the negative and that claimant's motion for summary judgment must be granted. (The present motion must be treated as one for summary judgment rather than a motion to dismiss since we take into account matters outside the pleadings, specifically the affidavit and notice by claimant to her moving papers.)

Directing our attention to the first issue, it would seem that if there is authority approving the right of a vessel owner to set up as a defense limitation of liability *in a state court action,* then notwithstanding that a state court does not have jurisdiction to determine such issue, this being a well recognized principle of the cases, C. G. & E. may have a point. We say this because otherwise it would be pointless to approve such procedure if a vessel owner's only real recourse was an adjudication as to limitation of liability by a federal court. C. G. & E. contends that such authority exists in *Langes* v. *Green,* 282 U. S. 531, 51 S. Ct. 43, 75 L. Ed. 520 (1931) and *Ex parte Green,* 286 U. S. 437, (1932). These cases, however, were decided prior to the introduction of the six-month limitation into the statute in 1936.

The purpose of the 1936 amendment was stated in *Deep*

Sea Tankers v. *The Long Branch,* 258 F. 2d 757 (2d Cir. 1958) at p. 772 where the court said:

> "In practice it developed that the proceeding by way of petition for limitation of liability was often a source of delay and circuity of action, because ship owners did not institute this independent proceeding until after the question of liability had been litigated and determined against them. To alleviate the abuses inherent in this situation, the Congress, on June 5, 1936, amended Section 185 to require that a petition for limitation must be filed within six months of notice of claim."

The 1936 amendment profoundly affects the holdings of the *Langnes* and *Green* decisions, for at the time that they were decided there was no time limitation on the right to resort to a district court for decision of a limitation of liability issue. Without the limitation period, this Court of course would have to proceed to consider the applicability of limitation of liability on the merits. But if it was the purpose of the introduction of a limitation period by the 1936 amendment to cut down the period which such a claim might be asserted, then clearly a new factor, not present at the time of *Langes* and *Green,* must be considered. Another factor which must be considered is the ample authority cited to us by C. G. & E. standing for the proposition that in an admiralty action commenced in the federal court by a claimant, the six-month limitation period is no bar to setting up a limitation of liability defense.

So we must deal with the question of whether it avails a vessel owner any, that in a state court action it sets up a limitation of liability defense, particularly in view of the fact that there is no time limitation for it to do so in a federal court proceeding. To support the proposition that it should make no difference as to which court

the defense is pleaded in, C. G. & E. cites *Murray* v. *New York Central R. Co.*, 287 F. 2d 153 (2d Cir. 1961). All that that case holds, however, is that in an action pending in federal court it matters not whether suit is brought in admiralty or on the civil side of the court.

After considering all of the preceding, we have to conclude that there is a fundamental gap which C. G. & E. cannot leap. That is that what is pending in this Court is a complaint by C. G. & E., not an answer. The setting up by way of answer in the state court of a limitation of liability of course did nothing whatever to invoke the jurisdiction of this Court. The state court action was not removed here. There is simply no relationship in pertinent legal terms between the state court action and the action pending here. The complaint of C. G. & E. is therefore, by its express terms, subject to the six-month period of limitations of 46 U.S.C. § 185 (called the procedural section of the statute in *The Chickie*, 141 F. 2d 80 (3rd Cir. 1944), particularly in view of the congressional intent in enacting this statute to curtail the rights and privileges of ship owners. *Grasselli Chemical Co. No. 4*, 20 F. Supp. 394 (S.D. N.Y. 1937); *Deep Sea Tankers* v. *The Long Branch*, 258 F. 2d 757 (2d Cir. 1958).

We have thus reasoned through to the same conclusion reached by Judge Paul in an all fours case, *Ohio River Company* v. *City of Wheeling*, 225 F. Supp. 733 (D.C. W. Va. 1964), the court there, as do we, relying in part in reaching its decision, upon a recognition of "the diminishing value of and justification for limitation of liability."

We therefore conclude that the motion of claimant for summary judgment should be granted, and the complaint of C. G. & E. be dismissed.

/s/ DAVID S. PORTER
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[TITLE OMITTED]

ORDER

(Filed July 8, 1975)

For the reasons set forth in our Opinion in this case filed simultaneously herewith, it is hereby ORDERED that the motion for summary judgment of claimant Patricia Abel d/b/a New Richmond Boating Center is hereby granted, and the complaint is dismissed.

/s/ DAVID S. PORTER
United States District Judge

APPENDIX M

No. 75-2100

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CINCINNATI GAS & ELECTRIC CO., OWNER of M/V "REDDY KILOWATT", *Plaintiff-Appellant,* v. PATRICIA ABEL, d/b/a NEW RICHMOND BOATING CENTER, *Defendant-Appellee.*	APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed April 16, 1976.

Before: PHILLIPS, Chief Judge; PECK and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. This is an admiralty case. May a shipowner who has been sued in a state court for damages arising out of the operation of his vessel on navigable waters rely on a defense of limitation of liability under 46 U.S.C. § 183 (a) pled in his answer in the state court proceedings or must he file a petition for limtiation in a federal district court within six months after receiving notice of a claim as provided in 46 U.S.C. § 185? This is the only question presented by this appeal.

FACTS AND COURT PROCEEDINGS

The tugboat "Reddy Kilowatt," owned by Cincinnati Gas & Electric Company (CG&E), collided with a marina on the Ohio River owned by Patricia Abel, d/b/a New Richmond Boating Center (Abel), on July 7, 1972. On January 30, 1974 Abel wrote CG&E demanding payment for the damage to the marina and consequential damages alleged to have resulted from the negligent operation of CG&E's vessel. On May 7, 1974 Abel filed an action in the Court of Common Pleas of Hamilton County, Ohio seeking $435,000 from CG&E for injury to its marina, loss of profits and other damages. A jury trial was demanded. In its answer, filed on June 19, 1974, CG&E pled, *inter alia,* that the value of its tugboat was $52,500 and "[i]n the event this answering defendant shall be held liable for all or any part of any loss and damage claimed by the plaintiff in her complaint, this answering defendant, as owner of the M/V Reddy Kilowatt, claims the benefit of limitation of liability as provided for in Sections 4281, 4282, 4283, 4284 and 4285 of the Revised Statutes of the United States (46 U.S.C. § 181-185), and the various statutes supplementary thereto and amendatory thereof."

CG&E made a motion for partial summary judgment limiting its liability to $52,500, citing 46 U.S.C. § 183 (a).[1]

[1] § 183.

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight when pending.

Abel opposed this motion on the ground that material issues of fact existed as to the privity or knowledge of the owner, the care exercised in choice of the master and crew and whether the limitation doctrine applies to consequential damages. By a supplemental memorandum Abel opposed the motion for summary judgment on the ground that CG&E had failed to comply with the terms of 46 U.S.C. § 185[2] which provides that a shipowner may seek limitation of liability by filing a petition in the proper federal district court within six months after written notice of a claim. On November 5, 1974 CG&E made a motion for stay of all proceedings in the state court "until such time as the movant shall have had an opportunity to have invoked the jurisdiction of the United States District Court for the Southern District of Ohio for a determination of such right and that Court shall have relinquished jurisdiction of these proceedings."

Though Abel agreed that the state court was without jurisdiction to decide the pure admiralty issue[3] of CG&E's

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[2] § 185.

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R.S. § 4285; June 5, 1936 c. 521, § 3, 49 Stat. 1480.

[3] *See United States* v. *Peters;* 9 U.S. (5 Cranch) 115 (1809).

right to limited liability, she opposed the motion on the ground that a petition in the district court at that time was barred by the six months provision of Section 185. The Court of Common Pleas entered an order denying summary judgment and granting a stay for 30 days for CG&E to file a proceeding in the district court. On December 3, 1974 CG&E filed a complaint in the district court seeking exoneration from, or limitation of, liability together with a stipulation (bond) for $52,500, interest and costs. Abel pled the six months requirement of 46 U.S.C. § 185 as a complete bar to CG&E's action. Following briefing the district court granted summary judgment to Abel and dismissed CG&E's complaint.

THE LEGAL ISSUE

Prior to 1936 a vessel owner could seek limitation of liability at any time, even by instituting an independent proceeding for this purpose after the issue of liability had been decided adversely to him. *See Deep Sea Tankers* v. *The Long Branch,* 258 F.2d 757, 772 (2d Cir. 1958), *cert. denied,* 358 U.S. 933 (1959). Congress amended Section 185 in 1936 to provide, *inter alia,* that such a petition must be filed within six motnhs after written notice of a claim. Though the statute uses the word "may," it has been held to mean "must" in the sense that an owner may file such proceedings within six months or not at all. *Petition of American M.A.R.C., Inc.,* 224 F.Supp. 573, 574 (S.D. Calif. 1963). After considering the legislative history of the 1936 amendment the court concluded in *The Grasselli,* 20 F.Supp. 394, 395 (S.D.N.Y. 1937), that the purpose of the six months limitation in Section 185 was "to cut down the rights and privileges of the ship owner." In *Petition of Goulandris,* 50 F. Supp. 452 (S.D.

N.Y. 1943), *aff'd,* 140 F.2d 780 (2d Cir.), *cert. denied,* 322 U.S. 755 (1944), it was held that since a proceeding under Section 185 is purely statutory one who seeks to avail himself of its benefits must comply fully with its terms. The requirement that a petition under Section 185 be filed within six months of notice has been held to be a condition precedent which must be met in order for an admiralty court to have jurisdiction of a limitation proceeding. *The Maine,* 28 F.Supp. 578, 582 (D.Md. 1939), *aff'd. sub nom. Standard Wholesale P. & A. Works* v. *Travelers Insurance Co.,* 107 F.2d 373 (4th Cir. 1939).

CG&E does not quarrel with any of these propositions. It maintains, however, that by raising the defense of limitation of liability in its timely answer in the state court it relied on the grant of limitation in 46 U.S.C. § 183 (a) which has no time limit. It only filed the complaint in the district court after Abel had contested its right to limitation and raised an issue outside the jurisdiction of the state court. It has long been recognized that limitation of liability may be invoked by a shipowner either as a defense in an action seeking damages or by an independent petition in admiralty. *Deep Sea Tankers* v. *The Long Branch, supra,* 258 F.2d at 772.

In *Langnes* v. *Green,* 282 U.S. 531 (1931), the Supreme Court held that a state court was competent to render relief by way of limitation of liability if the claimant, an injured seaman, did not contest the right of the shipowner to limit its liability. The shipowner had filed an independent federal court proceeding after the claimant had sued for damages in a state court. The Supreme Court directed that proceedings go forward in the state court, with the federal court retaining the petition for limitation as a matter of precaution, to be acted upon only if the claimant should bring into question the owner's right to limi-

tation. The Court quoted from *The Lotta,* 150 F. 219 (D. S.C. 1907), as follows:

> The owner of the vessel, therefore, can by answer in the state court set up as a defense that he is not liable beyond the value of the vessel . . . . 282 U.S. at 543

Subsequently, the claimant in *Langnes* v. *Green, supra,* did contest the right of the owner to limit its liability and the Supreme Court held that the federal court was "authorized to resume jurisdiction and dispose of the whole case." *Ex Parte Green,* 286 U.S. 437, 440 (1932).

The *Green* cases established that a shipowner may obtain the advantage of Section 183 (a) by proper pleading in a state court, at least in situations such as the present one where there is only one claimant. *See also Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255, 260 (1922). However, these cases were not concerned with the six months requirement of Section 185 since they were decided prior to the 1936 amendments to the Limited Liability Act.

In *The Chickie,* 141 F.2d 80 (3d Cir. 1944), the court considered the question of whether the six months limitation period of Section 185 governs a claim for limitation of liability asserted by way of an answer. Finding that two methods of obtaining limited liability had always been available, the court concluded that the time limitation of Section 185 should not be read in Section 183 (a). The court stated —

> The 1963 Amendments did not abolish the right of a ship owner to plead limitation in his answer; both methods are still available thereunder. What may be termed the substantive section of the statute, § 3 of the 1851 Act, which gave the ship owner the defense of limitation of liability, is still in force, without any express time limitation in it. See § 183 (a). The

> six months limitation was inserted only in what may be called the procedural section, § 185.
>
> 141 F.2d at 85. (footnote omitted).

The Second Circuit followed the ruling of *The Chickie* in its decision in *Deep Sea Tankers* v. *The Long Branch, supra,* noting that the abuses at which the 1936 amendments were directed "are not encountered when limitation is pleaded by way of answer, because the libelant, by filing its libel, controls the time within which the remedy must be invoked." 258 F.2d at 772-73.

Abel contends that both *The Chickie* and *Deep Sea Tankers* are distinguishable because in both cases the claimants brought admiralty actions in federal courts and the answers containing the pleas of limited liability were filed there, not in state courts. We have been cited to, and have found no case decided since the effective date of the 1936 amendments which holds that an answer containing a plea of limited liability which is filed in a state court satisfies the requirements of Section 185. CG&E cites *Murray* v. *New York Central R.R. Co.,* 287 F.2d 152 (2d Cir.), *cert. denied,* 366 U.S. 945 (1961)), in which a deck hand brought a civil suit in federal court, rather than an admiralty action, to recover for personal injuries suffered aboard a barge which was being maneuvered by the defendant's tug. In its answer, which was filed more than six months after notice of the claim, the owner of the tug claimed the right to limit its liability under Section 183(a). The court held that the six months provision of Section 185 did not apply since the issue of limitation of liability was raised by answer. The court found that it was immaterial whether the original claim was filed on the "admiralty side" or the "civil side" of the court. Holding that the owner was not required under

these circumstances to file an independent action under Section 185 the court stated "[t]he rule for which appellant contends disregards the desirability of one trial only, where all rights can be fairly decided in a single legal proceeding." *Id.* at 153.

We find *Murray* to be persuasive, but not conclusive. The court noted that though the claimant's primary cause of action was a Jones Act claim, by including a claim for maintenance he had invoked the admiralty jurisdiction of the district court. Thus the case was already on the "admiralty side" with respect to one of its claims before the petition for limited liability was filed. Furthermore, the entire case was before the district court from its inception. It is apparent that there is a difference, in terms of jurisdictional considerations, between transferring an issue for separate trial from one division or "side" of a single court and transferring it for separate trial in an entirely different court system. This is the jurisdictional obstacle which the district court found impassable in this case, as did the court in *Ohio River Co.* v. *City of Wheeling,* 225 F. Supp. 733 (N.D. W. Va. 1964). We note also that the strongest argument in *Murray* related to the desirability of disposing of all issues in a single legal proceeding. This may be achieved in a case such as this one only in a federal court. When the right to limited liability is contested it becomes impossible to dispose of all the issues in a single proceeding in a state court.

While conceding that Abel's action could not have been removed to a federal court because of the "savings to suitors" clause of 28 U.S.C. § 1334[4] and that there is no

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[4] § 1333.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

procedure for transferring an issue from a state to a federal court, CG&E argues that the state court "yielded jurisdiction" to the federal court on the issue of limitation of liability. Regardless of how the procedure is described, the fact remains that the state court lost jurisdiction of the limitation of liability issue when the claimant contested the owner's right to avail itself of limitation and only an admiralty court had jurisdiction to decide the issue. Furthermore, the only method available to CG&E for invoking that jurisdiction was to follow the procedures prescribed by Section 185 and Supplemental Rule F for Admiralty and Maritime Claims which incorporates the six months requirement of Section 185.

The question presented here is a close one. *See* 3 *Benedict on Admiralty* § 73, at 8-11-14; Gilmore & Black, *The Law of Admiralty* 855 (1975). When a shipowner is faced with a claim or claims in excess of the value of his vessel, the prudent thing for him to do is to file a protective petition in the proper federal court pursuant to Section 185. *See The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 19-20 n. 20 (1972); Gilmore & Black, *supra* at 858-59. A petition for limitation of liability has been described as "an *anticipatory* protective measure to avoid full personal responsibility if liability shall later be imposed." *Petition of United States,* 367 F.2d 505, 508 (3d Cir. 1966), *cert. denied,* 386 U.S. 932 (1967) (emphasis added). Prior to the adoption of the 1936 amendments it was not necessary to anticipate the possibility of claims exceeding the value of the vessel; it was sufficient to raise the issue after judgment. Now, however, an owner who receives a notice of a claim acts at his peril if he fails to file a petition for limitation in a federal court within six months. Having done this, if he is then sued in the district court, he can move for consolidation of the petition for

limitation with the damage action. The procedure which the Supreme Court prescribed in *Langnes* v. *Green, supra,* modified to reflect the six months provision of Section 185, remains the preferred way of dealing with a contested issue of limitation of liability where the case has originated in a state court. At the time the owner files a petition under Section 185 he may make a motion to stay proceedings on his petition until it is determined whether it will be necessary to decide the limitation question. If the right to limitation is not contested in the state court and a final judgment is entered there without the necessity of litigating the limitation issue, the Section 185 proceedings in the district court can then be dismissed. *See Rubenstein* v. *Bryant,* 522 F.2d 1351 (5th Cir. 1975); *Great Lakes Dredge & Dock Co.* v. *Lynch,* 173 F.2d 281 (6th Cir. 1949).

Since the purpose of amending Section 185 was to cut down the right of a shipowner to limit his liability, the time limit imposed by the amendments should be strictly enforced. *Cf. Donnelly* v. *Brown,* 230 F.2d 169 (6th Cir. 1956). Any ambiguity in the amended version of the Limited Liability Act should be resolved in favor of permitting full recoveries and requiring strict adherence to the statutory requisites for limiting liability. *See Maryland Casualty Co.* v. *Cushing,* 347 U.S. 409, 437 (1954) (Black, J., dissenting); *Petition of Dodge, Inc.,* 282 F.2d 86, 89 (2d Cir. 1960). Knowing of previous decisions permitting the right to limited liability to be raised by answer in state court proceedings, Congress could have provided for the continuance of this procedure with a reasonable time limit. However, both the amendment to Section 185 and Rule F, *supra,* require that a petition be filed in a district court of the United States. Failure to so file within

six months of written notice of a claim deprives the vessel owner of the benefits of limitation of liability.

The judgment of the district court is affirmed.

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2100

CINCINNATI GAS & ELECTRIC CO.,
Owner of M/V "REDDY KILOWATT",
Plaintiff-Appellant,

v.

PATRICIA ABEL, d/b/a NEW RICHMOND
BOATING CENTER,
Defendant-Appellee.

JUDGMENT

(Filed April 16, 1976)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN A. HEHMAN
Clerk

A True Copy.

Attest:

/s/ DARLENE KOENIG
Deputy Clerk

Issued as Mandate: May 20, 1976

COSTS: To be awarded to Appellee

Filing fee	$ ——
Printing	$ 61.66
Total	$ 61.66

Supreme Court, U. S.
FILED
JUL 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-50

CINCINNATI GAS & ELECTRIC COMPANY,
Owner of M/V "Reddy Kilowatt",
Petitioner,

v.

PATRICIA ABEL
dba NEW RICHMOND BOATING CENTER,
Respondent.

MEMORANDUM OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-50

CINCINNATI GAS & ELECTRIC COMPANY,
Owner of M/V "Reddy Kilowatt",
Petitioner,

v.

PATRICIA ABEL
dba NEW RICHMOND BOATING CENTER,
Respondent.

MEMORANDUM OF RESPONDENT

QUESTION PRESENTED FOR REVIEW

The only question involved in this appeal is:

> "Where a complaint is filed in the United States District Court captioned "AN ACTION FOR EXONERATION FROM OR LIMITATION OF LIABILITY", more than six months after the Appellee has given such owner a written notice of the claim, is such claim for limitation of liability barred by reason of Title 46, U.S.C., § 185, and Supplemental Rule F of the Federal Rules of Civil Procedure?"

Petitioner in its statement of the question presented, says:

> "Where, in a maritime tort action properly pending in a state court, the plaintiff challenges the right of the vessel owner under 46 U.S.C. § 183(a) to limit liability. . . ."

This is not true because the Fourth Defense of the Claim and Answer (App. I, 25a) says:

> "Plaintiff's Complaint was not filed within the time provided by law for the filing of such actions. Under the provisions of the 46 U.S.C. Sec. 185 and Supplemental Rule F(1) of the Federal Rules of Civil Procedure, a complaint for limitation of liability must be filed not later than six months after receipt by the vessel owner of written notice of the claim."

No mention is made of § 183.

STATEMENT OF THE CASE

When trying to circumvent a crystal clear statute of limitations it takes thousands of words to unfold a legal theory. Petitioner takes 32 pages of argument attempting to circumvent the simple six months *filing* limitation of a *Liability Limitation* action in the United States District Court. This same lengthy argument was found specious by two United States District Judges and three United States Court of Appeals Judges, with no contrary findings by any court in a situation such as here presented, and Judge Lively below said his court could not find any (App. M, 40a).

At about 11:15 P.M. on July 7, 1972, a ferry boat owned by co-defendant, New Richmond Ferry, Inc., broke loose from its mooring to a tree on the Ohio side of the Ohio River, and drifted downstream into the marina which had been hand-constructed from year to year by Patricia Abel and her family, and very successfully operated for several years. As a result of its colliding with the marina negligible damage ($3,650.00) was done. While this was going on, Petitioner claims that it was

> ". . . summoned to the scene by the police and, in the course of her Good Samaritan efforts, came in contact with the marina." (Brief, p. 4).

After giving written notice to CG&E on January 30, 1974, the Complaint was filed in the Ohio Court of Common Pleas on May 7, 1974, against Petitioner, alleging, inter alia:

> "9. Defendant, Cincinnati Gas & Electric Company, was negligent in the operation of its tug, repeatedly fouling, striking, ramming, and colliding with Plaintiff's marina and work boat." (App. A, 3a).

resulting in total damage to the marina; then valued in excess of quarter of a million dollars, without adding four years' intervening inflationary costs for replacement. The filing of this Complaint was *well within the six months allowed* by Statute and Rule for filing a limitation of liability action in the United States District Court (46 U.S.C. § 185; Supplemental Rule F) FRCP.

Plaintiff had not, nor ever has had, either the means or the borrowing power to replace the marina, although one of Petitioner's defenses is that she should have mitigated her damages.

Petitioner principally bases its reason for granting a Writ of Certiorari on the specious theory that the boat owner should not have to choose to limit liability within six months after being notified of a claim before he *knows* that formal claim will be filed if claimed elsewhere. The actual fact which kills this case is CG&E had eighty-four (84) days after the claim was formalized, by a *suit duly filed*, within which it could have filed its Limitation of Liability action in the United States District Court. It elected not to do so at its peril.

Petitioner filed its answer to the Complaint with a cross-claim against New Richmond Ferry, on June 19, 1974. Thereafter a Motion for Summary Judgment was filed by Petitioner, based upon its Seventh Defense seeking Limitation of Liability down to $52,500.00 (the alleged value of the tug). (App. B, 7a).

The Ohio Common Pleas Court undisputedly correctly found it had no jurisdiction over the admiralty question of Limitation of Liability, and stayed that proceeding pending further action by Petitioner. (App. G, 19a).

On December 3, 1974, Petitioner filed its Liability Limitation action in the United States District Court for the Southern District of Ohio, Western Division, captioned "*Cincinnati Gas & Electric Co., Plaintiff, Owner of M/V "REDDY KILOWATT", in an Action for Exoneration from or Limitation of Liability*". (App. H, 20a) to which Patricia Abel filed her *Claim and Answer* (App. I, 24a), the fourth defense of which alleged that the

> ". . . complaint was not filed within the time provided by law for the filing of such actions under the provisions of 46 U.S.C., § 185, and Supplemental Rule F(1) of the Federal Rules of Civil Procedure. . . ." (App. I, 25a).

and seeking that the Complaint be dismissed at its cost and that the case be remanded to the Court of Common Pleas, Hamilton County, Ohio (App. I, 25a).

Upon *Claimant's Motion to Dismiss and/or for Summary Judgment*, filed February 14, 1975, and after briefs and arguments, the United States District Court wrote an Opinion, filed July 8, 1975, (App. K, 28a), finding in favor of Claimant, and dismissed the action and entered an order accordingly (App. L, 33a).

Immediately (July 10, 1974) Patricia Abel filed a *Motion to Reinstate and to Advance the Case for Trial* in the Ohio Court of Common Pleas (Ex. A hereto), which was thereafter stayed because Petitioner filed its Notice of Appeal (July 25, 1975) in the United States Court of Appeals for the Sixth Circuit followed by its Brief on October 28, 1975. Before that brief Patricia Abel filed a *Motion to Advance Case for Hearing*, based on extreme hardship, on October 20, 1975, with memorandum in support thereof (Ex. B), which was forthwith granted. The case was advanced and argued on February 13, 1976, and the Opinion was filed April 16, 1976 (App. M, 34a). On May 6, 1976, Patricia Abel filed a new *Motion to Reinstate and to Advance the Case for Trial*, in the State court, with a memorandum in support thereof (Ex. C). This motion was argued and granted on June 10, 1976, setting the case for trial August 23, 1976.

Petitioner opposes the motion for early trial setting, alleging as a reason that it proposed to petition this Court for a Writ of Certiorari. Nevertheless the Court permitted the trial setting to stand, and when the entry accordingly was filed, Patricia Abel filed a *Motion for Separate Trial of Liability and Damages*, with a memorandum in support (Ex. D). Petitioner is resisting this Motion for Separate Trial, and filed a memorandum on June 15, 1976, to which Patricia Abel filed a reply memorandum on June 23 (Ex. E). Oral argument on the motion for separate trials will be heard on August 2nd. On July 12, 1976, Petitioner filed a new motion to Vacate the Trial Setting because this Petition was then filed.

Parenthetically, Patricia Abel is without the use of her marina, and without the substantial income to which she had become accustomed, and has been greatly financially embarrassed in the raising of her family. (Ex. B, 50).

ARGUMENT

Petitioner concedes that it had written notice of the claim dated January 30, 1974 (App. I, 26a). Suit was filed in Ohio State Common Pleas Court against Petitioner on May 7, 1974. The action below was filed on December 3, 1974 (App. H, 20a).

In so far as this action is concerned, the important factor is that Patricia Abel *rightfully* filed her suit in the Common Pleas Court of Hamilton County, Ohio, alleging that

Petitioner and New Richmond Ferry participated in varying degrees in the destruction of her marina, which she and her family had built and successfully operated for many years. It was clear that the State court was without authority to enforce a maritime limitation of liability set up by CG&E. It is equally clear that this limitation action filed in the U.S.D.C. was entirely independent of and sought separate relief from that of the Common Pleas Court action, which was neither *removed* nor in any way *transferred*, nor could it have been.

U.S.C., Title 46, § 185 (Br. 3), is an added amendment to Chapter 8, "Limitation of Vessel Owner's Liability", of Title 46, "Shipping", and became law on June 5, 1936. At the same time of the enactment of § 185, § 183(a) was repealed and § 183(c) was revised; § 183(b) had been added on August 29, 1935.

According to 28 U.S.C., § 2071, this Court may from time to time prescribe rules for the conduct of its business, provided that such rules are consistent with the Acts of Congress. Since Congress passed 46 U.S.C., § 185, effective June 5, 1936, amending the March 3, 1851, C. 43, § 4; 9 Stat. 635, which earlier statute had not limited the time for filing a Limitation of Liability action after notice, thus Supreme Court Admiralty Rule 51 would be in conflict, and this Court was obligated to enact Rule F limiting such Limitation of Liability to six months.

Section 185 providing that

> ". . . Within six months after the claimant shall have given to or filed with such owner written notice of the claim MAY petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter as amended. . . ."

Petitioner emphasises the word MAY, as do we. We submit that Congress is not *requiring* that the ship owner

file for limitation of liability, but *permits* him to do so. However, when he elects to do so, he MUST make such filing within six months after notice in the Federal District Court.

Applying this reasoning to the instant case, New Richmond Ferry, causing $3,650.00 worth of damage, would never file a limitation of liability action when its ferry boat was worth slightly under $10,000.00, and § 185 does not require it to do so. On the other hand, CG&E, with an exposure of over half a million dollars, and a tug worth $52,500, obviously should take advantage of the provision of § 185, but electing to do so, it *must* do it within six months *after notice from the claimant.*

Calendar No. 2165 of the 74th Congress, Second Session Senate Report No. 2061, reporting on "Limitation of Ship Owners' Liability" reports no oral comment by members of Congress as to this precise point, but on page 6 under the heading "The Proceeding to Limit Liability—Deposit of Security and Time for Filing of Petition", explains—

> "The proposed amendment to section 4285 provides, first, that the vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of a claim, may petition a *district court of the United States of competent jurisdiction for limitation of liability.* Under the old law there was no time fixed within which such a petition might be filed." (Emphasis added).

Thus it seems perfectly clear that MAY is *permissive* as to the right of the ship owner to limit his liability, but *mandatory* as to the time and place within which he may elect to do so.

Mr. Justice Clark, in *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147 (1957), during the course of his opinion of the majority, at 151, while discussing § 184 and its meaning, goes on to say:

> "The succeeding section (185 sic) provides that in such an event the owner "may petition a district court of the United States . . . for limitation of liability within the provisions of this chapter. . . ." It further declares that upon compliance with its requirements "all claims and proceedings against the owner with respect to the matter in question shall cease." This provision is implemented by Rule 51 of our admiralty rules which spells out in more detail *the manner* in which the owner of any vessel who shall "desire to claim the benefit of limitation of liability . . ." shall proceed." (Emphasis added.)

This legislative history simply fortifies the two opinions below, and the one by Chief Judge Charles F. Paul in *Ohio River Co.* v. *City of Wheeling*, U.S.D.C., N.D., W.Va., 225 F. Supp. 733 (1964), which was the first case raising this identical question.

The essential facts of that *Ohio River Co.* case are *identical* to the facts here. Judge Paul's opinion was not appealed. That opinion was well-considered, and has been known to river carriers since January, 1964, eight years before this catastrophe. Thus, CG&E was, or should have been, well aware of the risk it took by not *properly* raising the Limitation of Liability defense during the 84 days following the commencement of this action in the Ohio Court of Common Pleas. Judge Porter below discussed and followed that opinion (App. K., 32a), holding:

> "We have thus reasoned through to the same conclusion reached by Judge Paul in an all fours case, *Ohio River Co.* v. *City of Wheeling*, 225 F. Supp. 733 (D.C. W.Va. 1964), the court there, as do we, relying in part in reaching its decision, upon regulation of "the diminishing value of and justification for limitation of liability."

Judge Lively for the 6th Circuit Court of Appeals below (App. M, 41a), said:

> "Furthermore, the entire case was before the district court from its inception. It is apparent that there is a difference, in terms of jurisdictional considerations, between transferring an issue for separate trial from one division or "side" of a single court and transferring it for separate trial in an entirely different court system. This is the jurisdictional obstacle which the district court found impassable in this case, as did the court in *Ohio River Co.* v. *City of Wheeling*, 223 F. Supp. 733."

After discussing Petitioner's contention he holds (42a):

> "Regardless of how the procedure is described, the fact remains that the state court lost jurisdiction of the limitation of liability issue when the claimant contested the owner's right to avail itself of limitation and only an admiralty court had jurisdiction to decide the issue. Furthermore, the only method available to CG&E for invoking that jurisdiction was to follow the procedures prescribed by Section 185 and Supplemental Rule F for Admiralty and Maritime Claims, which incorporates the six months requirement of Section 185."

It cannot be successfully disputed that the *purpose* of the amendment of § 185 and Rule F was to *cut down the time* for asserting the right of a shipowner to limit his liability. That time limit so imposed should be strictly enforced. Both the amendment to § 185 and Rule F *require* that a petition be filed in the District Court of the United States, and as in all limitation of action provisions, failure to so file within six months of written notice of a claim *deprives* the vessel owner of the very substantial benefit of limitation of liability (here from over $700,000 down to approximately $52,000).

This Court very recently in a unanimous opinion written by Mr. Justice Stewart modernizes ancient maritime law by abolishing the Admiralty Rule of divided damages,

whereby the property damage in a maritime collision or stranding is equally divided whenever two or more parties involved are found to be guilty of contributory fault *regardless of the relative degree* of their fault, and found that such damage should be proportionate to the comparative *degree* of fault. *U.S.* v. *Reliable Transfer, Inc.*, 43 L.W. 4610, No. 74363 (May 19, 1975).

As Mr. Justice Black said in *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 437; 74 S. Ct. 608, 623; 98 L. Ed. 806:

> "*Judicial expansion* of the limiting liability act at this date seems *exceptionally inappropriate.* Many of the conditions of the shipping industry which induced the 1851 Congress to pass the Act *no longer prevail.*" (Emphasis added.)

In effect Petitioner seeks an *advisory* opinion of this Court, since it:

(1) had "notice" of the claim on January 30, 1974;
(2) had been sued for approximately $500,000.00, on May 7, 1974;
(3) knew that its tug was worth only $52,500.00;
(4) admits knowledge of 46 U.S.C. § 185;
(5) should have had knowledge of Supplemental Rule F (FRCP);
(6) could unquestionably have filed this liability limitation action in the United States District Court any time before July 30, 1974, without having to try to invoke § 183 and without possibility of dismissal.

COMMENTS ON PETITIONER'S PETITION FOR A WRIT

A. Although great stress was placed on Supplemental Rule F for Admiralty and Maritime Claims, FRCP, in our briefs and in oral arguments below, Petitioner ignores it

completely in his Petition for a Writ of Certiorari. Had the unanimous court below ignored the Rule, this omission might be explainable, but it did not do so (App. M, 42a, 43a).

B. A major point repeatedly argued can be put in question form. Because Patricia Abel was the *sole* victim of this tort feasor, is she to be deprived of full restitution of her damage because her action could not be a "multiple claim situation", in which two or more injured or damaged persons might have shared a single recovery fund? (Br. 4). With this Court's recognition of equity and justice, the answer seems obviously "No".

C. As in all syllogisms, *every* premise must be correct. This is recognized by the Petitioner by the use of the word

> ". . . *if* the foregoing analysis is correct, we are entitled to a reversal. . . ." (Br. 9).

Not only one, but all of C, D, and E are incorrect (Br. 8).

D. Where is "uneven justice" (Br. 15) applicable to CG&E, since it could have followed the law by going into the District Court during the 84-day period after the Complaint for $435,000.00 had been filed on May 7, 1974? Certainly it knew the small value of its tug.

E. It is utter trivia to even comment on the fact that an earlier notice to Petitioner had been sent on March 4, *1973*. (Br. 16).

F. On the same page, 16, Petitioner emphasizes that the six months requirement as to Limitation of Liability appears *only* in 46 U.S.C. § 185. We again call the Court's attention to Supplemental Rule F, which repeats that six months provision.

G. The argument at the top of page 17 to the effect that a single claim situation must await the commencement of litigation

> ". . . after which he may by answer, set up the limitation of liability right as a defense. In the case at bar this is exactly what we sought to do in the state court at the earliest opportunity."

fails utterly because, although it could and did set up Limitation of Liability in the state court, it has repeatedly, in both courts below, admitted knowledge of the correct holding of that court in that it had no jurisdiction over such maritime questions.

H. The *Chickie* is relied on considerably, but it should be noted at the end of the quote, the court says:

> "It should tend, without an express declaration by Congress to increase the economic burden of ship owners, thus placing them in the competitive position which the statute sought to avoid." (Br. 8)

Where is the economic burden here? Is Patricia Abel an individual to be limited to $52,500.00 when her claim against CG&E, a corporation far exceeds ten times that amount?

I. The lengthy argument under E (Br. 23) as to which court has the right to determine all of the issues when the action was originally rightfully filed in the Ohio State court is a complete "straw man situation". Getting back to fundamentals, the time limitation of six months was fixed by both Congress and this Court to prevent abuse *by* ship owners, and even more fundamental is the obvious fact that CG&E wants only to save an enormous sum of money by cutting down its liability for the damage it caused to Patricia Abel.

Lastly, Petitioner urges this Court to consider the hazardous "decision the ship owner must make" in filing an action within six months to limit liability in damages. It completely fails to point out where the "hazard" was in the decision it made as to procedure in this case. That

failure is due solely to the fact that it *took a chance* by failing to file in the United States District Court during the 84 free days following the filing of the original Complaint on May 7, 1974.

CONCLUSION

We are unable to find a rule of this Court providing for the advancement of the consideration of a Petition for Writ of Certiorari, nor are we able to find a provision for allowance of attorneys' fees when a frivolous appeal such as this is filed. Nevertheless, we urge the Court to expedite the denial of this Petition, and if possible to order payment of printing charges and attorneys' fees. In any event, this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

PHILIP J. SCHNEIDER
Attorney for Respondent
1318 Central Trust Tower
Cincinnati, Ohio 45202

Of Counsel:

WAITE, SCHINDEL, BAYLESS & SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202

EXHIBIT A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A 743423

(Filed July 10, 1975)

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,
Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.,
and
NEW RICHMOND FERRY, INC.,
Defendants.

MOTION TO REINSTATE AND TO ADVANCE CASE FOR TRIAL

Plaintiff represents to the Court that both defendants filed actions in the United States District Court for the Southern District of Ohio, Western Division, for exoneration from and limitation of liability, which said actions were dismissed per motions for summary judgment filed by this plaintiff. Copies of the Order of Dismissal in each case are attached to, made a part hereof, and marked "Exhibits 1 and 2." This plaintiff therefore moves the Court to reinstate the action against these defendants on the active trial docket.

Plaintiff further represents to the Court that the business of operating a marina was her sole source of income,

Exhibit A

that because of the very great amount of money required to reconstruct the marina, which she neither has nor can borrow, she is without any revenue from this business; that she has two children in school, and has been required to borrow money at exorbitant rates of interest in order to continue their education; that at no time has she, as the proprietor of plaintiff, been charged with negligence contributing to cause the demolition of the marina; and that the principal, if not sole issue is the reasonable amount which she should be paid from these defendants for the restoration thereof.

Therefore, under O.R.C. § 2311.07, she moves the Court that this case be advanced on the docket for trial.

PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

MEMORANDUM

Complaint and Jury Demand was filed in this Court on May 7, 1974. Answers were filed by both defendants on June 24 and July 10; after preliminary pleadings, on November 6, plaintiff filed motions to strike, etc., and thereafter defendants filed motions to stay this proceeding until after it was determined whether these defendants were properly before the United States District Court on their actions for exoneration from or limitation of liability. After hearing in open court, this court denied the motions for summary judgment and granted a stay requested by defendants until actions in the United States District Court were determined.

Exhibit A

As disclosed by the Orders signed by Honorable David S. Porter, United States District Judge, on July 8, 1975, the actions of both defendants as to this plaintiff were thereby dismissed. This case is now postured for final determination by a jury in this Court.

O.R.C., § 2311.07 provides in part:

> ". . . for good cause shown are especially assigned for trial or hearing out of their regular order".

Plaintiff has claimed continuing damages because of the loss of her marina and by this motion demonstrates the great hardship which continuing delay causes. Therefore, this plaintiff urgently prays this Court to advance her case for trial out of its regular order for the reasons stated herein.

PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum have been mailed to James L. O'Connell, Attorney for Defendant, C. G. & E. Co., and to William B. Singer, Attorney for Defendant, New Richmond Ferry, Inc., this ____ day of July, 1975.

PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 75-2100

(Filed October 20, 1975)

CINCINNATI GAS & ELECTRIC COMPANY
PLAINTIFF, OWNER OF M/V "REDDY
KILOWATT," IN AN ACTION FOR EXON-
ERATION FROM OR LIMITATION OF
LIABILITY,

Plaintiff-Appellant,

v.

PATRICIA ABEL, d/b/a NEW RICHMOND
BOATING CENTER,

Defendant-Appellee.

MOTION OF CLAIMANT-APPELLEE, PATRICIA ABEL, d/b/a NEW RICHMOND BOATING CENTER, TO ADVANCE CASE FOR HEARING

Motion Granted. Case will be assigned to calendar upon submission of briefs by all parties.

J. P. HEHMAN, *Clerk*

Claimant-Appellee, Patricia Abel, represents to the Court that Plaintiff-Appellant, C.G. & E. Co., and the New Richmond Ferry Company, Inc., filed separate actions in the United States District Court for the Southern District of Ohio, Western Division, for "Exoneration From and

Exhibit B

Limitation of Liability", which were consolidated on March 3, 1975, and which said actions were dismissed upon motions for summary judgment filed by this claimant-appellee. This Opinion dismissing C.G. & E. begins at Appendix, p. 54, and the Order is App. 59. New Richmond Ferry did not appeal.

This Claimant-Appellee moves the court, pursuant to Rule 7(b) of this Court, to advance this case for hearing on the active hearing calendar.

Claimant-Appellee further represents to the Court that the business of operating a marina was her sole source of income, that because of the very great amount of money required to reconstruct the marina, which she neither has nor can borrow, she is without any revenue from this business; that she has two children in school, and has been required to borrow money at exorbitant rates of interest in order to continue their education; that at no time has she, as the proprietor of New Richmond Boating Center, been charged with negligence contributing to cause the demolition of the marina; and that the principal, if not sole issue, is the amount of money which she should be paid for the restoration thereof.

Therefore, under Rule 7(b) of the Rules of the United States Court of Appeals for the Sixth Circuit, she moves the Court that this case be advanced on the active calendar for hearing.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Claimant-Appellee
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

Exhibit B

MEMORANDUM

Complaint and jury demand was filed in the Court of Common Pleas of Hamilton County, Ohio, on May 7, 1974. Answers were filed by both defendants on June 24 and July 10. After preliminary pleadings, on November 6, Claimant-Appellee (Plaintiff in the Court of Common Pleas action) filed Motions to Strike, etc., and thereafter defendants filed motions to stay the proceeding until after it was determined whether these defendants were properly before the United States District Court on their actions for exoneration from or limitation of liability. After hearing in open court, the Court of Common Pleas of Hamilton County, Ohio, denied the motions for summary judgment and granted the stay requested by defendants, until actions, if filed within thirty days, in the United States District Court, were determined.

The Opinion and Order entered by the Honorable David S. Porter, United States District Judge, on July 8, 1975, dismissed the actions of both C.G. & E. and the New Richmond Ferry, Inc., although conditionally as to New Richmond.

Thereupon Claimant-Appellee promptly filed in the Court of Common Pleas of Hamilton County, Ohio, a Motion to Reinstate and to Advance Case For Trial (July 10, 1975) a copy of which is attached hereto and marked "Exhibit A". Upon C.G. & E.'s Notice of Appeal filed herein, the Common Pleas Court deferred action thereon until a determination herein.

This case is more than ready for a final appellate hearing and determination by this Honorable Court. Rule 7(b) provides:

> "(b) *Advancement of Hearing.* The court may, on its own motion or for good cause shown on motion of either party, advance any case to be heard at any session, though the time permitted under the rules for filing briefs may not have expired at the day set for hearing."

Exhibit B

Claimant-Appellee has claimed continuing damages (App. p. 10, par. 18) because of the loss of her marina, and by this motion demonstrates the great hardship which continued delay causes. Therefore, this Claimant-Appellee urgently prays this Court to advance her case for hearing out of its regular order, for the reasons stated herein.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Claimant-Appellee
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum have been mailed to all counsel of record for Plaintiffs-Appellants in this case, this 20th day of October, 1975.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Claimant-Appellee

EXHIBIT C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A 743423

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,

Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.,

and

NEW RICHMOND FERRY, INC.,

Defendants.

MOTION TO REINSTATE AND TO ADVANCE CASE FOR TRIAL

Plaintiff represents to the Court that following the first Motion to Reinstate and to Advance case for Trial, filed with this court on July 10, 1975, defendant appealed to the United States Court of Appeals for the Sixth Circuit. Plaintiff moved that court on October 20, 1975, to advance the case for hearing, which motion was granted by three judges of the United States Circuit Court of Appeals. A photocopy of said motion and granting is attached hereto and made a part hereof. The case was briefed and set for argument on February 13, 1976. Following that argument, that court unanimously affirmed the dismissal of the case in the United States District Court from which the appeal was perfected, and filed its printed opinion on April 16, 1976. Thus that action no longer is a bar to the trial of

Exhibit C

this action, and the question of limitation of liability is out of this case.

Therefore, under O.R.C. § 2311.07, plaintiff moves the Court that this case be advanced on the docket for trial.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
WAITE, SCHINDEL, BAYLESS & SCHNEIDER
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

MEMORANDUM

Plaintiff reincorporates the memorandum filed with the first Motion to Reinstate and to Advance.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum have been mailed to James L. O'Connell, Attorney for Defendant, C.G. & E. Co., and to William B. Singer, Attorney for defendant, New Richmond Ferry, Inc., this ____ day of May, 1976.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff

EXHIBIT D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A 743423

(Filed June 10, 1976)

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,

Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.,
a corporation, et al.,

Defendants.

MOTION FOR SEPARATE TRIAL OF LIABILITY AND DAMAGES

Now comes the plaintiff, Patricia Abel, doing business as New Richmond Boating Center, and moves the Court for an order to separate the trial in the above-mentioned action, presently set for August 21, 1976, so as to proceed to trial on a bifurcated basis, liability first, and then damages in the event of a finding of liability, in accordance with Rule 42(B) of the Ohio Rules of Court.

Exhibit D

Said motion is made in furtherance of convenience to the Court, and further said trial on a bifurcated basis would be conducive to expedition and economy.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
WAITE, SCHINDEL, BAYLESS & SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

MEMORANDUM

This case particularly lends itself to bifurcation for the following reasons:

Defendants filed separate actions in the United States District Court for the Southern District of Ohio, Western Division, which were consolidated by that Court. No defendant is required to be named in such an action, but on the same day it filed in the District Court and served upon plaintiff, Patricia Abel, d/b/a New Richmond Boating Center, through her attorney, Philip J. Schneider, its "Notice of Action Brought for Exoneration from or Limitation of Liability". On December 20, 1974, Patricia Abel filed her "Claim and Answer". Defendant, New Richmond Ferry, because the amount of damages prayed against it did not warrant an action for limitation of liability, but is a necessary party, as it was the beginning of causation.

Those petitions were titled "Complaints for Exoneration from or Limitation of Liability", and filed on December 3, 1974. The C.G. & E. petition was numbered Civil Action C-1-74-480, and a bond was posted by the Insurance Com-

pany of North America as surety in the sum of $52,500.00, ". . . together with interest thereon at the rate of six (6%) per cent per annum from the date of this undertaking, for the payment of such sum and interest to the benefit of whom it may concern, . . ."

Prior to that filing, Defendant, C.G. & E., had petitioned this Court to stay this action until that proceeding had been perfected. This Court entered an order accordingly on December 2, 1974, Image 467.

In due course a motion by Patricia Abel, etc. to dismiss and/or for summary judgment against C.G. & E. was granted by the United States District Court on July 8, 1975. A copy of the order is attached hereto and marked "Exhibit A".

Thereafter, C.G. & E. perfected an appeal to the United States Circuit Court of Appeals, which action was numbered 75-2100 on the docket of that Court, and claimant-appellee Abel filed her motion "to advance case for hearing" on October 20, 1975, based on hardship, which motion was forthwith granted. Arguments were heard by the United States Court of Appeals on February 13, 1976, and a printed opinion was filed April 16, 1976, unanimously affirming the United States District Court.

C.G. & E. now suggests that it is going to petition the Supreme Court of the United States for certiorari, and will ask this Court for another stay pending disposition of that action.

Thus it can be seen that *if there is liability*, C.G. & E. would have to pay plaintiff, Patricia Abel, the sum of $52,500.00, with interest from December 3, 1974. Plaintiff believes she can prove far more than that sum as damages if not limited to the $52,500.00 under maritime law.

Plaintiff's marina was constructed from the Ohio shore of the Ohio River at New Richmond, Ohio, extending into the

river when, on July 7, C.G. & E.s tugboat "KILOWATT" ran into and totally damaged the marina (see paragraphs 6 and 7 of the Complaint filed herein on May 7, 1974). Defendant, C.G. & E., filed an answer asserting seven defenses and a cross-claim, primarily addressed to co-defendant, New Richmond Ferry, Inc. Liability being disputed, it should be tried by a jury on the evidence *as to that issue*. It may be that all of the defenses are frivolous, and that a directed verdict would be granted. In any event, presently there is a dispute as to liability, and should defendant prevail there would be no question of the amount of payment.

Usually in a motion such as this the foregoing would be sufficient to cause bifurcation. However, in this instance there are other very considerable elements to be considered by this Court. First, if there is liability and no limitation as to the amount of damages, plaintiff would have to prove the allegations of her complaint, which would require the employment of possibly three expert maritime surveyors (appraisers), whose fees are very high. Plaintiff is without any funds, and could not possibly gamble the very large sum involved by employing such experts without first knowing that liability has been determined. With the question of liability being determined in favor of plaintiff, she would be assured of recovering $52,500.00, and could therefore employ the necessary experts to prove the very large damages which she knows to exist. The trial, if not bifurcated, would require that several such surveyors be ready and able to testify on August 21st. If such surveyors knew her financial condition (as they would inevitably), it is unlikely that she could adequately prepare for trial on damages.

Secondly, plaintiff also claims "loss of use and profits", which would require different expert testimony, again at

great expense. Such experts would have to be employed promptly so that proper studies could be made. If there is no liability on the part of C.G. & E., expenditures for such expert studies would be wasted.

We submit that this is one of the most ideal cases for bifurcation that could be presented, and *without any prejudice* to defendant, C.G. & E., since, if no liability, it could then make a determination as to whether to proceed with the considerable cost of certiorari proceedings in the Supreme Court. Furthermore, there would be a far better chance of settlement with liability determined, thus avoiding the time-consuming trial.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
WAITE, SCHINDEL, BAYLESS & SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum were mailed to all counsel of record for defendants in this action by ordinary United States Mail, postage prepaid, this ____ day of June, 1976.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff

EXHIBIT E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A 743423

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,
Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.

and

NEW RICHMOND FERRY, INC.,
Defendants.

REPLY MEMORANDUM OF PLAINTIFF RE MOTION TO SEPARATE TRIALS

(Filed June 23, 1976)

This motion of plaintiff is not one to be taken lightly, because the consequences of an adverse decision would be inestimably damaging to plaintiff.

C.G.& E. in its brief says that it—

> ". . . will contend that any damages sustained by the plaintiff as the result of the incident of July 7-8, 1972, *were minimal.*"

When a tort feasor totally destroys the lifelong product and business of an innocent bystander, which property was valued in excess of $400,000.00 in 1972, such damage would

not be *minimal*, even to C.G.& E. This allegation is premised on the same "quicksand" as is its Third Defense (Paragraph 7), to-wit: *contributory negligence* of the plaintiff herself, who was on shore when the catastrophe was committed.

The Fourth Defense is even more ridiculous, by alleging that she assumed the risk of any damages sustained by her. Can it be successfully contended that merely building a marina, where authorized by the proper U. S. Governmental agency, and in operation for years on the Ohio shore of the Ohio River extending into the waters of the Ohio as of course it had to, makes her "assume the risk" of a towboat owned by C.G.& E. ramming the marina repeatedly? A negative answer seems obvious.

Passing the Fifth Defense, of laches, this Court's attention is directed to the Sixth Defense (paragraph 10), which alleges that plaintiff negligently failed to mitigate damages and thus is not entitled to recover. This is particularly false when it is averred under oath in both this Court, the United States District Court, plus the United States Circuit Court of Appeals that plaintiff is without any funds and without borrowing capacity, having no collateral, either of which would be required to rebuild this marina, thus the only way of mitigating damages.

We pass C.G.& E.'s cross-claim, as it only involves the co-defendant, the New Richmond Ferry, which may or may not be liable in excess of the known damage caused by it.

This allegation of mitigation of damages raises an interesting point particularly applicable to this motion to bifurcate. If and when liability is established and should the responsible party be the C.G. & E. Co., then there may be a possibility that plaintiff could mitigate damages by borrowing funds to build anew the presently destroyed marina.

If she could do so, the result would certainly be the mitigation of the mounting damages now accruing.

As to the contention that discovery is necessary, this is true in practically all disputed litigation. Plaintiff is ready to be deposed by New Richmond Ferry and/or C.G.& E., which could take only a few hours or days at the utmost. In this case, it seems certain that both defendants are as knowledgeable as to the facts as is the plaintiff.

An appeal to the United States Supreme Court, if perfected, certainly would take an undeterminable amount of time. The liability of C.G.& E., which amounts to its conduct, is as readily distinguishable as the value of the damaged property, and thus should be determined separately as we pointed out in our original memorandum.

Respectfully submitted,

/s/ PHILIP J. SCHNEIDER

PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
WAITE, SCHINDEL, BAYLESS
& SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum were mailed to all counsel of record for defendants in the within action this ..... day of June, 1976.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff